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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, APPELLANT,

vs.

PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

FILED SEPTEMBER 12, 1961

JURISDICTION POSTPONED NOVEMBER 13, 1961

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I

RELEVANT DOCKET ENTRIES.

Appeal from the decision of the Board of Finance and Revenue. Capital Stock Tax 1951.

Dec. 6, 1954—Appeal and Objections filed.

Dec. 22, 1954—Approved bond filed.

Jan. 8, 1957—Stipulation of Facts filed.

Jan. 8, 1957—Amendment to stipulation of Facts filed.

Jan. 8, 1957—Stipulation to try without jury filed.

Jan. 12, 1957—Record of Hearing of Jan. 8, 1957 lodged.

Jan. 9, 1958—Briefs of Commonwealth and Defendant filed. Case argued before Court *en banc*, Record to Court.

Jan. 9, 1958—Commonwealth's Requests for Findings of Fact and Conclusions of Law filed.

Jan. 9, 1958—Defendant's Requests for Findings of Fact and Conclusions of law filed.

Feb. 15, 1958—Record of Hearing of January 8, 1957 filed.

Apr. 28, 1958—Appeal is dismissed. Judgment entered in favor of the Commonwealth and against Defendant in amount of $97,271.63. This amount having been paid, Judgment shall be marked satisfied upon payment of costs by Defendant unless excep-

tions hereto be filed in accordance with law, see opinion and decree filed.

May 26, 1958—Defendant's Exceptions filed.

May 14, 1959—Plaintiff's and Defendant's brief filed, case argued before Court *en banc*, Record to Court.

July 9, 1959—Each of the 45 exceptions is dismissed and Judgment entered in accordance with decree *nisi* entered April 28, 1958.

Sept. 18, 1959—*Certiorari sur* appeal from Supreme Court to No. 24 May T. 1960 filed.

Sept. 18, 1959—Notice of Appeal and Acceptance of Service of Appellee filed.

II

APPEAL AND SPECIFICATION OF OBJECTIONS

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, hereinafter referred to as appellant, hereby appeals from the settlement of capital stock tax made against it for the year 1951 and from the refusal of its Petition for Review by the Board of Finance and Revenue and hereinafter specifies its objections thereto and in support thereof avers:

1. Appellant was incorporated under the laws of the the Commonwealth of Pennsylvania on February 10, 1914, for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property." Its name originally was Easton and Western Railroad Company, which was subsequently changed to its present name in 1944. It owns and subleases railroad track mileage from others, in Pennsylvania. Its lines in 1951 connected with the lines of its parent company, The Central Railroad Company of New Jersey, at the Pennsylvania border.

2. In its capital stock tax report filed with the Department of Revenue for the year 1951, appellant indicated that its address in Pennsylvania was Navigation Building, Mauch Chunk; that its books were kept at Express Building, Jersey City Terminal, Jersey City 2, New Jersey; and that it had "various" places of business.

3. During the year 1951, appellant transacted business in Pennsylvania and, also, it actually transacted business through the maintenance of offices and the activities of employees at locations outside of Pennsylvania—Jersey City, New York City, Albany, Boston, Buffalo, Chicago, Cleveland, St. Louis, Long Branch and Wharton, New Jersey. It paid salaries

and wages of $1,524,835.52 to officers and employees at such locations pursuant to an Agreement dated August 5, 1946, between its parent and itself.

4. During the year 1951, appellant's diesel locomotives and freight cars were run on fixed routes and regular schedules in and out of Pennsylvania over its own lines and the lines of its parent company; and, also, its revenue freight cars were used and operated either by way of through freight shipments or by way of interchange, on the lines of other railroads in and out of Pennsylvania; and for such use, appellant received as compensation a portion of through freight rates and/or per diem rentals.

5. In its capital stock tax report for 1951 and/or at a conference with the representatives of the taxing departments prior to the tax settlement, appellant submitted data and claimed that the average proportionate value of its diesel locomotives in the amount of $1,466,160 and the average proportionate value of freight cars in the amount of $7,808,295, which were regularly, habitually and/or continuously employed on the lines of other railroads outside of Pennsylvania, were not subjected to tax under the capital stock tax statute or were beyond the jurisdiction and power of the Commonwealth of Pennsylvania to subject to a property tax such as the capital stock tax. Accordingly, appellant claimed that the appropriate asset fraction ratio to be applied to its capital stock value should be determined as follows:

Total assets per report	$25,168,264
Add: Depreciated value of freight cars fully amortized at Dec. 31, 1951	2,484,910
Total assets—adjusted	$27,653,174

Less: United States securities	$1,852,471	
Average value of diesel locomotives outside of Pennsylvania ..	1,466,160	
Average value of freight cars outside of Pennsylvania	7,808,295	
		$11,126,926
Numerator		$16,526,248
Denominator—adjusted total assets .		$27,653,174

6. On October 27, 1952, the Department of Revenue settled and, on October 29, 1952, the Department of the Auditor General approved settlement of capital stock tax against appellant for the year 1951 wherein appellant's claims in respect to its diesel locomotives and freight cars were not allowed. A true and correct copy of said settlement, mailed to appellant on November 14, 1952, is attached hereto, made a part hereof, and marked Exhibit "A."

7. On February 11, 1953, appellant filed with the Department of Revenue its Petition for resettlement of said account; and on March 18, 1954, the Departments of Revenue and Auditor General, after hearing thereon, refused the prayer of said Petition for Resettlement. A true and correct copy of the notice of refusal, mailed to appellant on March 19, 1954, is attached hereto, made a part hereof, and marked Exhibit "B."

8. On May 14, 1954, appellant filed with the Board of Finance and Revenue its Petition for review of the action of the taxing departments in refusing its Petition for Resettlement; and, on October 20, 1954, the Board, after hearing thereon, refused the prayer of

said Petition for Review. A true and correct copy of the notice of refusal, mailed to appellant on October 21, 1954, is attached hereto, made a part hereof and marked Exhibit "C."

9. In accordance with the Acts of General Assembly in such case made and provided, appellant, Central Railroad Company of Pennsylvania, being aggrieved by the tax settlement and the decision of the Board of Finance and Revenue, prosecutes this appeal therefrom and files herewith the following:

SPECIFICATION OF OBJECTIONS

(1) Appellant's diesel locomotives and freight cars which are regularly, habitually and/or continuously used and employed on the lines of other railroads outside of Pennsylvania are not subject to capital stock tax, which is a direct property tax, on their entire value by Pennsylvania, the domiciliary state.

(2) The tax settlement and the decision of the Board of Finance and Revenue violate the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, which do not authorize or provide for the taxation of the entire value of appellant's diesel locomotives and freight cars under the facts in this case.

(3) The provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, if authorizing tax on the entire value of appellant's diesel locomotives and freight cars under the facts of this case; the tax settlement; and the decision of the Board of Finance and Revenue violate:

(a) The due process of the laws provisions of Sections 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that appel-

lant's diesel locomotives and freight cars to the extent of all or a proportionate part of their value have acquired a tax situs outside of Pennsylvania and are beyond the power and jurisdiction of the Commonwealth of Pennsylvania to subject to the capital stock tax, which is a property tax.

(b) The uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the entire value of the diesel locomotives and freight cars or similar property of other corporations domiciliary to Pennsylvania, which are in the same class as appellant, is not subjected to capital stock tax under similar circumstances.

(c) The provisions of Section 8, Clause 3 of Article I of the Constitution of the United States in that the taxation of the entire value of appellant's diesel locomotives and freight cars under the facts in this case constitutues multiple taxation of interstate operations and such taxation has no relation to the opportunities, benefits or protection which Pennsylvania, the taxing state, gives those operations.

(4) The Board of Finance and Revenue erred in making the following decision:

"This Petition for Review is refused and the action taken by the Department of Revenue, approved by the Department of the Auditor General, is hereby sustained."

(5) The Board of Finance and Revenue erred in refusing to resettle the tax as claimed by appellant.

(6) General relief.

WHEREFORE, Appellant prays that this Honorable Court shall hear its appeal and that the proper adjustment, order or decree be entered in favor of appellant correcting said settlement of capital stock tax against appellant for the year 1951 by eliminating therefrom any tax or portion thereof imposed upon or with respect to the average value of its diesel locomotives and freight cars as claimed by appellant herein, or for such other relief as may be proper under the circumstances of this case; and that a credit be allowed for any overpayment of capital stock tax by appellant.

And it will ever pray, etc.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

(CORPORATE SEAL)

(SEAL)

By /s/ JUDSON C. MCLESTER, JR.
JUDSON C. MCLESTER, JR.

Attest:

/s/ R. E. TESTON
Secretary

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss:*

JUDSON C. MCLESTER, JR., being duly sworn according to law, deposes and says that he is Vice President of CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, the appellant in the foregoing appeal to the Court of Common Pleas of Dauphin County, Pennsylvania, from the settlement of capital stock tax made against it for the year 1951 and from the refusal of its Petition for Review by the Board of Finance and

Revenue; that this appeal is not taken for the purpose of delay, but because appellant believes injustice has been done by the settlement of the account and the decision of the Board of Finance and Revenue appealed from; and that the facts set forth in the said appeal and in the accompanying Specification of Objections incorporated herein and in the exhibits attached thereto are true to the best of his knowledge and belief.

/s/ JUDSON C. MCLESTER, JR.

JUDSON C. MCLESTER, JR.

Sworn to and subscribed before
me this 3rd day of December,
1954

/s/ MARY A. MCNAMARA

Notary Public

My Commission Expires: Mary A. McNamara, Notary Public, State of New York, No. 03-25124-00 Qual. in Bronx Co., Certs. filed with N. Y. Co. Clk., Bronx and N. Y. Co. Regs. Term Expires March 30, 1955

(SEAL)

HULL, LEIBY AND METZGER
208 Walnut Street
Harrisburg, Pennsylvania

Attorneys for Appellant.

EXHIBIT "A"

Capital Stock Tax Settlement 1951

SETTLEMENT CAPITAL STOCK TAX

(Certified Copy)

Commonwealth of Pennsylvania
Department of Revenue
Harrisburg, Penna.

Date Mailed—Nov. 14, 1952
Box No. 979-06
Invoice No. . . . . .

Return this sheet with remittance drawn to the order of Commonwealth of Pennsylvania.

Checks are received subject to final payment and at the risk of the taxpayer.

Note: Balance due on this account bears interest at 6% from due dates to date of payment, as provided in Section 806 of the Fiscal Code, as amended

CENTRAL RAILROAD COMPANY OF PENNA.
c/o Hull, Leiby and Metzger
208-210 Walnut St.
Harrisburg, Penna.

In account with the Commonwealth of Pennsylvania

To Tax on Capital Stock for year ended 12/31/51

Proportion of Taxable Assets *		*Value of Capital Stock as appraised by Department of Revenue*		*Taxable value of Capital Stock*
$23,315,793 / $25,168,264	X	$21,000,00	=	$19,454,327

* Exempt Assets considered to arrive at Proportion Taxable.

Tax at rate of 5 mills	$97,271.64
Amount of this settlement (Do not include interest)	$97,271.64
Amount paid (Interest Statement will payment of Tax balance)	97,000.00
BALANCE DUE COMMONWEALTH	$271.64

(SEAL)

Department of Revenue

Harrisburg, Pa., 10/27/52
settled and delivered to auditor general:

/s/ SAM. B. GIRVIN

For Otto F. Messner
Secretary of Revenue
Department of the Auditor General

Harrisburg, Pa., 10/29/52
audited and approved:

/s/ RAY L. STOLZ

For Chas. R. Barber
Auditor General

I HEREBY CERTIFY that the above is a true copy of the original remaining on file in this Department. Witness my hand and seal of office.

OTTO F. MESSNER,
Secretary of Revenue

EXHIBIT "B"

Refusal of Petition for Resettlement. Printed as Commonwealth's Exhibit No. 3 at Page 30a, infra.

EXHIBIT "C"

Refusal of Petition for Review. Printed as Commonwealth's Exhibit No. 6 at Page 36a, infra.

III

EVIDENCE-TRANSCRIPT OF PROCEEDINGS

BEFORE: Honorable William H. Neely, Judge; Honorable Walter R. Schnr, Judge; Honorable Homer L. Kreider, Judge, and Honorable Karl E. Richards, Judge, 12th Judicial District of Pennsylvania, Courts of Dauphin County.

At Harrisburg, Pennsylvania, Tuesday, January 8, 1957, beginning at 10:17 o'clock, a. m., E.S.T., in Court Room No. 1, Dauphin County Court House.

APPEARANCES:

For the Commonwealth:

George W. Keitel, *Esq.*
Deputy Attorney General

For the Defendant:

Hull, Leiby & Metzger
By: Roy J. Keefer, *Esq.*

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2—Petition for Resettlement	18a	20a
3—Order Refusing Petition for Resettlement	18a	20a
4—Petition for Review	18a, 19a	20a
5—Order of Board of Finance and Revenue continuing final action	19a	20a
6—Order of Board of Finance and Revenue refusing Petition for Review	19a	20a
7—Ledger Record	19a, 20a	20a
8—Stipulation of Facts	20a	20a
9—Amendment to Stipulation of Facts	20a	20a
10—Stipulation to try case without a Jury	20a	20a

Defendant's Exhibits:		
1—Appeal and Specification of Objections	21a	21a
2—Appeal Bond	21a	21a

MR. KEITEL: May it please the Court, this is an appeal from the settlement of the capital stock tax for the year 1951, against the Central Railroad Company of Pennsylvania. This defendant is a Pennsylvania corporation and during the year 1951, the year here in question, operated a railroad over its tracks which are located entirely within the borders of Pennsylvania. Its lines connected with the lines of its parent company, The Central Railroad of New Jersey.

In its Specification of Objections, the defendant objects to the capital stock tax settlement primarily because the valuation of its capital stock includes the entire value of its diesel locomotives and freight cars used on lines of other railroads outside the lines of Pennsylvania. The defendant alleges that this tax settlement violates the due process and commerce clauses of the Federal Constitution, and due process and the uniformity clauses of the State Constitution.

It is the Commonwealth's position, inter alia, that all of the value of the defendant's diesel locomotives and freight cars must be included in the value of its capital stock in the absence of showing such diesels or freight cars have acquired a situs outside of Pennsylvania, because as you will recall this is a domestic corporation and its domicile is here. It is not authorized to do business in any other state.

This is just a summary of the numerous contentions on both sides that are raised by this appeal. The facts in this case have been agreed upon by counsel. We have filed a Stipulation of Facts in which we reserve the right to object to the relevancy and materiality of some of the facts stated therein. We have also filed, or will file, a Supplemental Stipulation of Facts which makes a small addition to one of the paragraphs in the Stipulation of Facts. We are also prepared to file a stipulation to try this case without a jury. Except

for the identification of the Commonwealth's papers, there will be no oral testimony in this case.

THE COURT (JUDGE NEELY): You say you are prepared to file, is the stipulation ready for filing?

MR. KEITEL: They will be introduced shortly; yes, sir.

MR. KEEFER: I just want to add the basis of the defendant's contention. The defendant's locomotives and freight cars are regularly, continuously and habitually employed on the lines of other railroads outside the State of Pennsylvania. And it is the defendant's position that because of that use, the locomotives and freight cars are beyond the power of the State to tax, and that to levy the stock tax, which is a property tax, violates due process of the law.

There is another contention of the defendant that unless this outside allocation is allowed, the defendant railroad company would be discriminated against, and the basis of that contention is that railroad companies having track mileage in and out of Pennsylvania are allowed this type of exemption that the defendant is claiming, whereas the exemption is being denied to the defendant.

Now, by that I mean that Pennsylvania Railroad, for example, its lines extend in and out of Pennsylvania. Its freight cars are used on the lines of other railroads. Now, just because Pennsylvania Railroad has trackage in and out is no reason to allow it an exemption for its freight cars while on the lines of other railroads and to deny that same exemption to this defendant. We say that the allowance of the exemption to Pennsylvania and the denial of it to this railroad company violates uniformity and equal protection of the laws.

MR. KEITEL: We call as a witness Mr. Knadler.

LEROY F. KNADLER: Called as a witness on behalf of the Commonwealth, being first duly sworn, testified as follows:

Direct Examination

BY MR. KEITEL:

Q. Will you state your full name please?
A. Leroy F. Knadler.

Q. Mr. Knadler, what is your occupation?
A. Taxing officer in the Department of Revenue, Bureau of Corporation Tax.

Q. Of the Commonwealth of Pennsylvania?
A. Commonwealth of Pennsylvania.

Q. As such you are familiar with the tax records and files of the Department of Revenue?
A. Yes, sir.

(Commonwealth's Exhibit No. 1, being 1951 Capital Stock Tax Report and Settlement, was produced and marked for identification.)

BY MR. KEITEL:

Q. I refer you first to a paper marked Commonwealth's Exhibit No. 1, and ask you to identify that.
A. This is the Capital Stock Report filed by transportation companies.

Q. And by what corporation is that report filed?
A. Filed by the Central Railroad Company of Pennsylvania for the year 1951.

Q. I refer you to the rear of that paper and ask you what it shows as to the settlement of the tax?
A. Tax assessed $97,271.64.

Q. As of what date is the settlement marked by the Revenue Department and the Department of the Auditor General?

A. It was settled and delivered to the Department of the Auditor General by the Department of Revenue on October 27, 1952. It was audited and approved by the Department of the Auditor General on October the 29th, 1952.

(Commonwealth's Exhibit No. 2, being Petition for Resettlement, was produced and marked for identification.)

By Mr. Keitel:

Q. I now refer you to paper marked Commonwealth's Exhibit No. 2 and ask you to identify that?

A. This is a Petition for Resettlement of the capital stock tax imposed against the Central Railroad Company of Pennsylvania for the calendar year 1951.

(Commonwealth's Exhibit No. 3, being Order Refusing Petition for Resettlement, was produced and marked for identification.)

By Mr. Keitel:

Q. Referring now to Commonwealth's Exhibit No. 3, will you identify that?

A. This is the usual notice of the action by the Resettlement Board and it is refused on March 18th, 1954.

(Commonwealth's Exhibit No. 4, being Petition for Review, was produced and marked for identification.)

By Mr. Keitel:

Q. Now, Commonwealth's Exhibit No. 4?

A. This is a Petition for Review of the capital stock

tax imposed against the Central Railroad of Pennsylvania for the calendar year 1951.

Q. That is filed with the—
A. That is filed with the Board of Finance and Revenue.

(Commonwealth's Exhibit No. 5, being Order of Board of Finance and Revenue continuing final action, was produced and marked for identification.)

By Mr. Keitel:

Q. I refer you now to Commonwealth's Exhibit No. 5, and ask you to identify that?
A. This is a notice of continuing the case as of July the 28th, 1954.

Q. Of what body?
A. By the Board of Finance and Revenue.

(Commonwealth's Exhibit No. 6, being Order of Board of Finance and Revenue refusing Petition for Review, was produced and marked for identification.)

By Mr. Keitel:

Q. Referring now to Commonwealth's Exhibit No. 6, will you identify that?
A. This is the notice of refusal of the Petition for Review by the Board of Finance and Revenue on October 20th, 1954.

(Commonwealth's Exhibit No. 7, being Ledger Record, was produced and marked for identification.)

By Mr. Keitel:

Q. I refer you now to Commonwealth's Exhibit No. 7 and ask you to identify that?

A. This is the transcript of the ledger record showing that the account is in balance for the year 1951, on the capital stock tax for 1951 for the Central Railroad of Pennsylvania.

Mr. Keitel: Those are all the exhibits.

Mr. Keefer: May I see the last one?

(Paper handed counsel.)

Mr. Keitel: We offer Commonwealth's Exhibits 1 to 7, inclusive, into evidence at this time.

The Court (Judge Neely): Any objections?

Mr. Keefer: No objections.

The Court (Judge Neely): Admitted.

Mr. Keitel: I also wish to offer Commonwealth's Exhibit No. 8, which is the Stipulation of Facts agreed to by counsel for the respective parties; Commonwealth's Exhibit No. 9, which is an amendment to Stipulation of Facts; and Commonwealth's Exhibit No. 10, which is the stipulation to try this case without a jury.

(Commonwealth's Exhibit No. 8, being Stipulation of Facts; Commonwealth's Exhibit No. 9, being amendment to Stipulation of Facts; and Commonwealth's Exhibit No. 10, being stipulation to try case without a jury, was produced and marked for identification.)

The Court (Judge Neely): No objections?

Mr. Keefer: No objections.

THE COURT (JUDGE NEELY): Admitted.

MR. KEITEL: The Commonwealth rests, Your Honor.

MR. KEEFER: We offer in evidence on behalf of the defendant the Appeal and Specification of Objections, being Defendant's Exhibit No. 1, and the Appeal Bond, being Defendant's Exhibit No. 2.

(Defendant's Exhibit No. 1, being Appeal and Specification of Objections and Defendant's Exhibit No. 2, being Appeal Bond, were produced and marked for identification.)

MR. KEITEL: No objections, Your Honor.

THE COURT (JUDGE NEELY): Admitted.

MR. KEEFER: The defendant rests.

(Whereupon, at 10:29 o'clock a.m., hearing concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the within cause, and that this copy is a correct transcript of the same.

PAUL E. ZEIDERS,

Official Stenographer

The foregoing record of the proceedings upon the trial of the within cause is hereby approved and directed to be filed.

WILLIAM H. NEELY,

Judge

COMMONWEALTH'S EXHIBIT NO. 1

1951 Capital Stock Tax Report and settlement thereon

(Report not printed, copies to be handed up to Court. Settlement printed at pp. 10a, 11a, supra)

COMMONWEALTH'S EXHIBIT NO. 2

Petition for Resettlement

IN THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR RESETTLEMENT OF CAPITAL STOCK TAX IMPOSED AGAINST CENTRAL RAILROAD COMPANY OF PENNSYLVANIA FOR THE CALENDAR YEAR 1951

(Box 979-06)

TO THE HONORABLE, OTTO F. MESSNER, SECRETARY OF REVENUE AND THE HONORABLE WELDON B. HEYBURN, AUDITOR GENERAL

Sirs:

The petition of Central Railroad Company of Pennsylvania, hereinafter referred to as petitioner, for resettlement of capital stock tax imposed against it for the Calendar Year 1951, respectfully represents:

Petitioner was incorporated under the laws of the Commonwealth of Pennsylvania on February 20, 1914 for the purpose of "constructing, maintaining and operating a railroad for public use in conveyances of persons and property." Its name originally was Easton and Western Railroad Company which was subsequently changed to the present name. It owns and also leases railroad track mileage from others in Pennsylvania.

During the year 1951, petitioner's diesel locomotives and revenue freight cars were used and operated either by way of through freight shipments or by way of interchange on the lines of other railroads outside of Pennsylvania; and for such use, petitioner received as compensation a portion of the through freight rates and/or per diem rentals.

On October 27, 1952, the Department of Revenue settled and, on October 29, 1952, the Department of the Auditor General approved settlement of capital stock tax against petitioner for the year 1951. A true and correct copy of said settlement, mailed to petitioner under date of November 14, 1952, is attached hereto, made a part hereof, and marked Exhibit "A".

In its capital stock tax report duly filed with the Department of Revenue for 1951 and in its pre-settlement conference with the representatives of the taxing departments, petitioner claimed exemption from capital stock tax for the value of its diesel locomotives and revenue freight cars when on the lines of other railroads outside of Pennsylvania. These claims were disallowed in the settlement.

In support of its contention that said settlement is erroneous, illegal and void, petitioner supplies the following facts and reasons:

1. Its diesel locomotives and revenue freight cars when used and operated on the lines of other railroads outside of Pennsylvania are not subject to the capital stock tax which is a direct property tax.

Pullman's Palace Car Co. v. Pennsylvania 141 U.S. 18
Union Transit Co. v. Kentucky 199 U. S. 194
Union Tank Line Co. v. Wright 249 U. S. 275
Ott v. Mississippi Barge Line Co. 336 U. S. 169
Standard Oil Co. v. Peck 342 U. S. 382

In the Wright case, the company owned tank cars and rented them to shippers at certain rates. The railroads over which they moved also paid a stipulated compensation. During the year involved Standard Oil Company of Kentucky, a renter, operated certain of the cars in Georgia under the agreement. Georgia sought to impose a direct tax on the value of the cars moving in and out of the state. The dispute did not involve the

power of Georgia to tax but involved the amount of the valuation. Concerning the power to tax, the Court said at page 282:

> "A State may not tax property belonging to a foreign corporation which has never come within its borders * * *. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the State according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce."

In the Ott case, Louisiana imposed an ad valorem tax based upon mileage apportionment on tugboats and barges of foreign corporations which touched the port of New Orleans only for short periods of time for loading and unloading purposes.

In the Peck case, Ohio sought to levy an ad valorem tax on *all* the boats and barges of an *Ohio* corporation which transported oil on the Mississippi and Ohio rivers, the river mileage bordering Ohio being only 17½ and the boats and barges only stopping in Cincinnati for fuel and repairs. The court held that mileage apportionment must be used and *that the tax in practical operation* must have some relation to opportunities, benefits or protection conferred or afforded by the taxing state.

On the basis of these decisions, it is submitted that when petitioner's diesel locomotives and revenue freight cars are regularly used and operated on the lines of other railroads outside of Pennsylvania they are beyond the jurisdiction of Pennsylvania and are not subject to capital stock tax. The value of such diesel locomotives outside of Pennsylvania is $1,422,364.41 as set forth in a schedule attached to petitioner's 1951 capital stock tax report; and the value of such revenue freight cars outside of Pennsylvania

is $7,697,445 as set forth in schedules attached hereto, made a part hereof, and marked Exhibit "B".

2. The imposition of capital stock tax on such diesel locomotives and revenue freight cars in said settlement violates the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended; the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania; the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the due process of the laws provisions of Sections 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, petitioner prays that the capital stock tax settled against it for the year 1951 be resettled as aforesaid.

Petitioner desires a hearing.

Respectfully submitted,

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

By /s/ E. T. MOORE, *President.*

(CORPORATE SEAL)
affixed

Attest:

/s/ W. M. KOHLER

Secretary

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss:*

E. T. Moore, being duly sworn, according to law, deposes and says that he is President of Central Railroad

Company of Pennsylvania; that he is duly authorized to make this affidavit in its behalf; that the foregoing petition is not made for the purpose of delay, but because petitioner believes injustice has been done by the settlement of the account for Capital Stock Tax for the twelve months ending December 31, 1951; that he has read the foregoing petition and the facts stated therein are true and correct, according to the best of his knowledge, information and belief.

/s/ E. T. Moore.

Sworn to and subscribed before me this 11th day of February, 1953.

/s/ Mary A. McNamara

Notary Public

My Commission Expires:
March 30, 1955

I Hereby Certify That this petition was prepared by Messrs. Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, on information obtained from the officers and records of petitioner.

/s/ Earle J. Harrington

Commerce Counsel of Central Railroad Company of Pennsylvania.

/s/ Hull, Leiby and Metzger
Attorneys for the Company

Commonwealth's Exhibit No. 2
Exhibits "A", "B(A-1)", "B(B-1)", "B(C-1)", and "B(D-1)"

EXHIBIT "A"—Capital Stock Tax Settlement

(Printed as Exhibit "A", Appeal and Specification of Objections at pp. 10a, 11a, supra).

EXHIBIT "B" (Statement A-1)—Allocation of Revenue Freight Cars to Penna. on Basis of Car Days

(Printed as Exhibit "Y-6" to Stipulation of Facts at page 144a, infra).

EXHIBIT "B" (Statement B-1)—Per Diem 1951—Railroads operating in and out of Pennsylvania.

(Printed as Exhibit "Y-4" to Stipulation of Facts at page 133a, infra).

EXHIBIT "B" (Statement C-1)—Per Diem 1951—Railroads Wholly Within Pennsylvania.

(Printed as Exhibit "Y-3" to Stipulation of Facts at page 132a, infra).

EXHIBIT "B" (Statement D-1)—Per Diem 1951—Car Days on Defendants' Own Lines in Penna.

(Printed as Exhibit "Y-2" to Stipulation of Facts at page 131a, infra).

EXHIBIT "B" (Statement E-1)—Per Diem 1951. Railroads not Operating in Pennsylvania.

(Printed as Exhibit "Y-5" to Stipulation of Facts at pages , infra).

EXHIBIT "B" (Statement F-1)—Value of Freight Cars Owned as of December 31, 1951.

(Printed as Exhibit "Y-1" to Stipulation of Facts at page , infra).

COMMONWEALTH'S EXHIBIT NO. 3

Order Refusing Petition for Resettlement

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF REVENUE

Harrisburg

March 18, 1954

In your reply please refer to

CB:ASB
Box No. 979-06

Hull, Leiby & Metzger
208-210 Walnut Street
Harrisburg, Pennsylvania

Gentlemen:

In Re: Central Railroad Company of Pennsylvania
1951 Capital Stock Tax

AND NOW, TO WIT, 3/18/54 the prayer of the petitioner for the resettlement of the above stated account is hereby refused.

DEPARTMENT OF REVENUE
Harrisburg, Pennsylvania

s/ SAMUEL C. HARRY

For Secretary of Revenue

AUDITOR GENERAL'S DEPARTMENT
Harrisburg, Pennsylvania

Approved:
s/ RAY L. STOLZ

For Auditor General

MAR 19 1954
Copy Mailed

COMMONWEALTH'S EXHIBIT NO. 4

Petition for Review

IN THE TREASURY DEPARTMENT
OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR REVIEW OF CAPITAL STOCK TAX IMPOSED AGAINST CENTRAL RAILROAD COMPANY OF PENNSYLVANIA FOR THE CALENDAR YEAR 1951

TO THE HONORABLE, THE BOARD OF FINANCE AND REVENUE:

Sirs:

The petition of Central Railroad Company of Pennsylvania, hereinafter referred to as petitioner, for review of capital stock tax settled against it for the year 1951, and of the refusal by the taxing departments of its petition for resettlement of said account, respectfully represents:

On October 27, 1952 the Department of Revenue settled and on October 29, 1952, the Department of the Auditor General approved settlement of capital stock tax against petitioner for the year 1951. A true and correct copy of said settlement mailed to petitioner under date of November 14, 1952 is attached hereto, made a part hereof and marked Exhibit "A".

On March 18, 1954, after hearing thereon, the Department of Revenue and the Department of the Auditor General refused the prayer of said petition for resettlement. A true and correct copy of the notice of refusal mailed to petitioner on March 19, 1954 is attached hereto, made a part hereof and marked Exhibit "B".

Petitioner respectfully requests your Honorable Board to review the settlement of capital stock tax made against it for the year 1951 and the refusal by the taxing departments of its petition for resettlement of said account.

Petitioner's reasons in support thereof are set forth in said petition for resettlement which is incorporated herein by reference and are supplemented herein as follows:

Petitioner's diesel locomotives and freight cars claimed not to be subject to the capital stock tax are beyond the jurisdiction and power of the state to tax because of the following circumstances:

1. Its diesel locomotives and some of its freight cars were employed on fixed routes and regular schedules.

2. Some of its freight cars were continuously outside of Pennsylvania during the tax period.

3. The same, or approximately the same, number of cars, although not the same cars, were continuously outside of Pennsylvania during the tax period.

4. All of its freight cars at issue were so regularly, habitually or continuously employed outside of Pennsylvania as to give other states jurisdiction to tax the same on all or part of their value.

The asset fraction ratio to be used in imposing capital stock tax against petitioner for 1951 is:

$$\frac{16,687,099}{27,653,174}$$

WHEREFORE, petitioner prays your Honorable Board to resettle and recompute its capital stock tax liability on the basis of the asset fraction ratio as set forth above.

Petitioner desires a hearing.

Respectfully submitted,

/s/ JUDSON C. MCLESTER, JR.

By _____
Vice President and General Counsel

SEAL

(CORPORATE SEAL.)

Attest:

_____
Secretary

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss:*

Judson C. McLester, Jr., being duly sworn, according to law, deposes and says that he is Vice President and General Counsel of CENTRAL RAILROAD COMPANY OF PENNSYLVANIA; that he is duly authorized to make this affidavit in its behalf; that the foregoing petition is not made for the purpose of delay, but because petitioner believes injustice has been done by the settlement of the account for capital stock tax for the calendar year 1951 and by the refusal of its Petition for Resettlement of said account; that he has read the foregoing petition and the facts stated therein, including facts and figures incorporated by

reference, are true and correct, according to the best of his knowledge, information and belief.

/s/ JUDSON C. MCLESTER, JR.

Sworn to and subscribed before me this 10th day of May, 1954.

SEAL

/s/ MARY A. MCNAMARA

Notary Public

My Commission Expires:
Mary A. McNamara
Notary Public, State of
New York
No. 03-2512400
Qual. in Bronx Co., Certs.
filed with N. Y. Co. Clk.,
Bronx and N. Y. Co. Regs.
Term Expires March 30,
1955.

I HEREBY CERTIFY That this petition was prepared by Messrs. Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, on information obtained from the officers and records of petitioner.

/s/JUDSON C. MCLESTER, JR.

Vice President and General Counsel of
CENTRAL RAILROAD COMPANY OF
PENNSYLVANIA

/s/ HULL, LEIBY AND METZGER

HULL, LEIBY AND METZGER
Attorneys for Petitioner.

EXHIBIT "A"—Capital Stock Tax Settlement

(Printed as Exhibit "A", Appeal and Specification of Objections at pages 10a, 11a, supra).

EXHIBIT "B"—Order Refusing Petition for Resettlement.

(Printed as Commonwealth's Exhibit No. 3 supra).

COMMONWEALTH'S EXHIBIT NO. 5

Order of Board of Finance and Revenue Continuing Final Action.

(Not printed by agreement of Counsel)

COMMONWEALTH'S EXHIBIT NO. 6

Order of Board of Finance and Revenue Refusing Petition for Review.

DOCKET NO. R-12629

IN RE: Central Railroad Company of Pennsylvania

PETITION FOR REVIEW of action taken by the Department of Revenue and approved by the Department of Auditor General on petition for resettlement of Capital Stock Tax for 1951.

AND NOW TO WIT October 21st, A. D. 1954, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania in this matter:

"And now to wit October 20th, A. D. 1954, This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of Auditor General, is hereby sustained."

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

WELDON B. HEYBURN, State Treasurer and Chairman
FRANK F. TRUSCOTT, Attorney General
GENE D. SMITH, Secretary of the Commonwealth
CHARLES R. BARBER, Auditor General
OTTO F. MESSNER, Secretary of Revenue

ELMER G. GRAHAM

ATTEST: _____

Secretary Board of Finance and Revenue

Copy mailed to: Hull, Leiby & Metzger, Attorneys at Law, Harrisburg, Pa., on October 21, 1954

COMMONWEALTH'S EXHIBIT NO. 7

Ledger Record

Central Railroad Company of Pennsylvania
Box No. 979-06

Capital Stock Tax 1951

Settled 10-29-52	$97,271.64	
Paid 3-13-52		$97,000.00
Paid by transfer		271.64

COMMONWEALTH'S EXHIBIT NO. 8

Stipulation of Facts

And Now, January 8, 1957, it is agreed by and between counsel for the COMMONWEALTH OF PENNSYLVANIA and counsel for CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, defendant, that the following facts are true and correct and shall be made a part of the record in this case.

1. The facts to be stated hereinafter relate to the capital stock tax appeal of defendant for the year 1951.

2. Defendant was incorporated under the laws of Pennsylvania on February 10, 1914 for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property".

3. Defendant's principal office in Pennsylvania was located in the Navigation Building, Mauch Chunk; and all of its capital stock, consisting of 18,301 shares having a par value of $100.00 per share, were owned by its parent company, The Central Railroad Company of New Jersey, a New Jersey corporation, hereinafter referred to as CNJ.

4. The railroad operated by defendant extended from the anthracite coal region in Pennsylvania to the Pennsylvania—New Jersey border at Easton where it connected with the railroad lines operated by CNJ. Its total mileage was 206.74—123.47, main line and 83.27 branch line.

5. Prior to August 5, 1946, the said railroad lines in Pennsylvania were operated, under lease, by CNJ with its own equipment. On August 5, 1946, with the approval of the Interstate Commerce Commission, defendant and CNJ entered into a Lease Agreement,

under which by direct ownership or subleases, defendant took over the operation of the said railroad lines in Pennsylvania and leased certain property and equipment from CNJ. Defendant, from time to time thereafter purchased other rolling stock and equipment as needed. On August 5, 1946, defendant and CNJ, also, entered into an Operating Agreement as later supplemented as of the same date which provided, *inter alia*, as follows:

> "Section 9. In the interest of economy and efficiency, certain of the officers of the respective parties and certain of the subordinates of such officers may be officers and employees both of Central [CNJ] and Pennsylvania [defendant]. In such cases, Central [CNJ] shall pay the salaries, wages, and personal and office expenses of such officers and employees (including Railroad Retirement and Unemployment Taxes, vacation expenses and the cost of owning, maintaining and operating general office facilities) and Pennsylvania [defendant] shall reimburse Central [CNJ] to the extent of 32% thereof in respect of such officers and employees in its freight and passenger traffic departments and 22% thereof in respect of such officers and employees in all other departments.
>
> "Any other employee of either party may be used by the other party for the purpose of enabling the latter to perform its obligations hereunder and the latter shall reimburse the former for the salaries or wages of any such employee and for any other expense and charges that may arise out of the employer-employee relationship while such employee is being used by the other party. Each party shall reimburse the other party for any wage or so-called penalty payment made by the latter to any employee as a result of the conduct of the former while it is using such employee under this Agreement".

True and correct copies of the Operating and Supplemental Operating Agreements are attached hereto, made a part hereof and marked Exhibits "A" and "B" respectively. These two Operating Agreements and the Lease Agreement, referred to herein, were in full force and effect during the year 1951.

6. The principal general officers of CNJ and of defendant are generally the same, as well as subordinate officials. Lists of these officials, their titles and the locations at which they perform their duties and functions are attached hereto, made a part hereof, and marked Exhibits "C" and "D".

7. Defendant in the operation of its railroad property and business is divided into nine departments as follows:

Department	*Location*	*Principal Officers*
Executive	New York, N. Y.	President
Transportation and Mechanical	Jersey City, N. J.	Vice-Pres. and General Manager
Legal	New York, N. Y.	Vice-Pres. and General Counsel
Traffic	New York, N. Y.	Vice-Pres.—Traffic
Accounting	Jersey City, N. J.	Vice-Pres.—Accounting
Treasurer	New York, N. Y.	Secretary-Treasurer
Real Estate, Tax and Valuation	Jersey City, N. J.	Property Manager
Purchasing and Stores	New York, N. Y.	Purchasing Agent
Medical	Jersey City, N. J.	Medical Director

A summary description of the functions and duties of the various departments is as follows:

Executive Department. This department, under the direction of the President located at 143 Liberty Street, New York 6, N. Y., includes the administration of policy as determined by the Board of Directors and direction and supervision of the general affairs of defendant.

Transportation and Mechanical. The functions of this department are the general operation of the rail-

road property in connection with defendant's transportation services. It is responsible for the efficient operation of both passenger and freight trains and, in cooperation with the Traffic Department, the schedulizing of various train movements both regular and extra. Subdivisions of this department, under the supervision of the Vice-President and General Manager are the following subdivisions:

Superintendent of Motor Power who is responsible for the maintenance, repair and assignment of locomotives for the various train movements.

Superintendent of Transportation who is responsible for the assignment of freight equipment to the various segments of the railroad so that there are adequate supplies of this equipment of various types to meet the demands of shippers.

Car Movement Bureau—which is a service division supplying information to shippers and receivers of freight with respect to the movement of specific shipments.

Manager of Labor Relations—The function of this section is the negotiation of labor contracts with the various union organizations and the settlement, if possible, of disputes in connection therewith, or if not settled, the protection of defendant's interest in matters before the Railway Labor Board.

Electrical Engineer—Function is the maintenance, installation etc. with respect to electrical power installations.

Signal Engineer—has similar duties as those of Electrical Engineer with respect to signaling and communicating systems.

Superintendent of Fuel—Function is to determine the types of, and oversee the efficient use of, fuel used in the various power units (locomotives).

The Vice-President in charge of Transportation and Mechanical Departments, together with all the subordinate officers who were the heads of the various subdivisions, were located at the Jersey Central Terminal of CNJ, Jersey City 2, New Jersey, with the exception of the Superintendent of Motor Power located at Elizabethport, New Jersey.

Traffic Department—The principal function is the solicitation of both passenger and freight business for defendant. This department is located at 143 Liberty Street, New York 6, N. Y., and at off-line points in Chicago, Albany, Boston, Buffalo, Detroit, St. Louis, Long Branch and Newark (N. J.), Cleveland, Pittsburgh, Philadelphia and Wilkes-Barre (Pa.). Included in the functions of this department are the determination under the applicable rules of the Interstate Commerce Commission of the rates to be charged for the various classes of commodities shipped via the rails and, in cooperation with other rules, the setting up of through routes and joint rates.

Legal Department—This Department with headquarters at 143 Liberty Street, New York 6, N. Y., acts as the legal adviser to all of defendant's departments. It appears on behalf of defendant in the various courts with respect to accidents involving personal injuries, claims for damaged freight, and actions which violate state regulations such as safety laws and hours of service. It appears, also, before the various Public Utility Commissions and the Interstate Commerce Commission with respect to charges for transportation services, sales of real property, discontinuance of train service and abandonment of segments of the railroad. It performs all work of a legal nature

in the issuance of securities, such as equipment trust certificates.

Accounting Department—This department is located in the Express Building at the terminal of CNJ in Jersey City, N. J. and has four principal subdivisions, Comptroller, Auditor of Revenues, Auditor of Disbursements, and Car Accountant:

Comptroller's Office—supervises the subdivisions and maintains the general books of defendant. It approves, from an accounting standpoint, all disbarsements of money on behalf of defendant and, also, makes field audits of Agent's accounts at the various freight and passenger stations.

The Auditor of Revenues—is responsible for the auditing of all way bills with respect to freight traffic and the auditing of passenger revenues. This section is responsible for the figures which result in the interline settlement of charges for transportation services where another railroad is a participating carrier.

Auditor of Disbursements—This section of the Accounting Department is responsible for the accounting procedures in connection with the payment of all bills for services, materials and like matters. Included in its functions are the maintenance of time records and the processing of all payrolls.

Car Accountant—This section maintains records and is responsible for accounting procedures with reference to hire and rental of freight and passenger equipment under the per diem agreement of the Association of American Railroads; and it prepares the interline settlements with all other carriers.

Treasurer—is located at 143 Liberty Street, New York 6, N. Y. This department has supervision of defendant's financial affairs, including the direction of

the deposit of funds in various banks in and out of Pennsylvania, and it issues all checks including payroll items. It, also, acts as paying agent for interest on various securities, such as Equipment Trust Certificates, Bonds and Conditional Bills of Sale. Where an Agent is directed to deposit his daily receipts in a designated bank, the Treasurer is the only authorized officer who may withdraw funds therefrom.

Property Department—is located in the Mail Building at the Jersey Central Terminal of CNJ, Jersey City, N. J. This department has four principal functions:

(a) The management of the defendant's real estate including the collection of rents from property leased and sale and purchase of property.

(b) Supervision of all tax matters with the exception of payroll taxes.

(c) Supervision and placing of insurance of various kinds with respect to real and personal property.

(d) Valuation—this subdivision is responsible for capital accounting functions including the reports required to be filed with the Interstate Commerce Commission relating to changes in the physical properties of the railroad.

Purchasing and Stores—This department, under the supervision of the Purchasing Agent located at 143 Liberty Street, New York 6, N. Y., with its principal warehouse at Elizabethport, N. J., supervises the purchase and distribution of all materials necessary to the operation of the railroad, including printing, stationery, etc.

Medical—This department, under the direction of the Medical Director located at the Jersey Central

Terminal of CNJ, Jersey City, N. J., conducts physical examinations of new employees and periodic examinations required for certain train service employees in accordance with the rules and regulations of the Interstate Commerce Commission and the various state public utility commissions. It, also, treats injured employees where the injury was incurred in the performance of their normal duties.

8. The general officers and subordinate officials of defendant were generally the same as those of CNJ as shown in Exhibits "C" and "D" attached hereto. These general officers and subordinate officials of defendant were on the payroll of CNJ but in performing functions and duties for defendant as described in Paragraph 7 herein they acted in their capacity as general officers and subordinate officials of defendant. Subordinate employees, performing functions and duties for defendant as described in Paragraph 7 herein were on the payroll of CNJ and when so engaged they were under the direction, control and supervision of a general officer or some other duly constituted official of defendant who were acting in such capacity. The performance of functions and duties for defendant as described in Paragraph 7 herein was in accordance with the Operating Agreement dated August 5, 1946, between defendant and CNJ, which is attached hereto as Exhibit "A". Attached hereto as Exhibits "E" and "F" are affidavits of defendant's President and General Counsel relating to the performance of these functions and duties for defendant.

9. The salaries, wages and other expenses incurred by general officers, subordinate officials and employees who performed functions and duties for CNJ and who, also, performed functions and duties for defendant as described in Paragraph 7 herein, were distributed

in accordance with the said Operating Agreement dated August 5, 1946 between said companies:

(a) During the year 1951, CNJ billed to, and was reimbursed by, defendant for such wages and salaries in the amount of $750,329.17 as listed in schedule attached hereto, made a part hereof and marked Exhibit "G". This schedule does not include billing by CNJ to defendant for Railroad Unemployment Insurance and Railroad Retirement Administration which were reimbused to CNJ by defendant. Under the system of Accounting required by the Interstate Commerce Commission, these amounts are reflected in defendant's Books of Account as salaries and wages paid by defendant and are so reported by defendant in its Annual Report for 1951 filed with the Interstate Commerce Commission and in its capital stock and corporate net income tax reports filed with the Pennsylvania Department of Revenue. Attached hereto, made a part hereof and marked Exhibit "H" is a true and correct copy of a schedule containing a more specific breakdown of wages and salaries of $750,329.17 paid by CNJ for which it billed to, and was reimbursed by, defendant.

(1) Attached hereto, made a part hereof and marked Exhibit "I" is a true and correct copy of a billing by CNJ to defendant for wages and taxes for the month of July 1951 and of distribution thereof by defendant to its Accounts as required by the System of Accounts as prescribed by the Interstate Commerce Commission. Similar billings and distributions were made for the other months of 1951. The amount for wages in the July bill ties in with Exhibit "G".

(b) Attached hereto, made a part hereof, and marked Exhibit "J" is a true and correct copy of a schedule of rentals paid by CNJ for offices at vari-

ous locations and of the portion thereof for which CNJ billed to, and was reimbursed by, defendant in accordance with the said Operating Agreement dated August 5, 1946 between the said Companies. The portion paid by defendant was reflected in its Books of Account as rental expenses as required under the System of Accounts as prescribed by the Interstate Commerce Commission. At these office locations, as well as at the offices in Jersey City and Newark, New Jersey (owned by CNJ) and in Wilkes-Barre, Pennsylvania (owned by defendant) were located general officers, subordinate officials and employees on the payroll of CNJ who performed functions and duties for CNJ and who performed functions and duties, also, for defendant as described in Paragraph 7 herein, in accordance with the said Operating Agreement dated August 5, 1946, between the said Companies.

(1) With the exception of the offices at 143 Liberty Street, New York 6, N. Y., the rentals paid by CNJ are distributed on the basis of 32 percent allocated to defendant since these offices were solely for the use of the Traffic Department of both companies.

(2) The rentals for the offices at 143 Liberty Street were apportioned on the basis of square feet occupied by the various departments which served both CNJ and defendant and were, also, allocated for all departments except the Traffic Department on the basis of 22 percent thereof to the defendant.

(3) Attached hereto, made a part hereof, and marked Exhibits "K" and "L" respectively is a true and correct copy of voucher of CNJ authorizing payment of rent for the month of March 1951 covering premises at 143 Liberty Street, New York and a true and correct copy of bill by CNJ to defendant to cover its proportionate share of the rent, plus

other items including rents paid for off-line offices, postage, telephone charges, etc. The specific debit and credit accounts as shown thereon are posted to the various operating expense accounts as required under the System of Accounts as prescribed by the Interstate Commerce Commission. Similar vouchers and bills were issued and rendered for the other months of 1951.

(c) Attached hereto, made a part hereof, and marked Exhibit "M" is a true and correct copy of bill of CNJ to defendant for its share of stationery costs for the month of July 1951. Similar bills were rendered for the other months of 1951.

10. In respect to various office locations, true and correct copies of the following are attached hereto, made a part hereof and designated as exhibits:

(a) 143 Liberty Street, New York 6, N. Y.

(1) Letterhead of defendant—Exhibit "N".

(2) Two bank statements—Exhibit "O".

(3) Draft by Bangor and Aroostook Railroad Company on defendant covering per diem earned during the month of October, 1951. Similar drafts were drawn by other railroads on defendant—Exhibit "P".

(4) Appointment notices—Exhibit "Q".

(5) General Notices, Adoption Notices and Circulars—Exhibit "R".

—all of which list 143 Liberty Street as the New York office address of defendant.

(b) Jersey City 2, New Jersey.

(1) Appointment notices—Exhibit "S".

(2) Circulars—Exhibit "T".

—all of which list Jersey City 2, as an office address of defendant.

11. Defendant's name appears in telephone directories with direction to refer to "Jersey Central Lines", on building directories and on office doors in New York and at off-line freight offices in Albany, Buffalo, Cleveland, Boston, St. Louis, Chicago, Detroit, Pittsburgh and Wilkes-Barre.

(a) Attached hereto, made a part hereof, and marked Exhibit "U" is a true and correct copy of defendant's letterhead used at its Detroit location. Similar letterheads are used at other off-line freight offices.

(b) Attached hereto, made a part hereof, and marked Exhibit "V" are true and correct copies of some of the calling cards used by officials and agents of defendant at various locations.

(c) Attached hereto, made a part hereof, and marked Exhibit "W" is an affidavit of William D. Wakeman relating to defendant's name on office doors at two locations. The same situation exists at all off-line freight offices.

12. Defendant is not qualified or authorized to do business in any other state than Pennsylvania. It does not pay franchise or property taxes to states other than Pennsylvania but it does pay railroad unemployment insurance and railroad retirement administration contributions on the wages and salaries of employees on its payroll which are paid directly by it and also pays railroad unemployment insurance and railroad retirement administration contributions on wages and salaries of $750,329.17 as set forth in Paragraph 9 herein.

13. Defendant is a member of the "Association of American Railroads". Under a "Car Service and Per

Diem Agreement" entered into by members of the Association, the owning railroad is paid a per diem rate for its freight cars while on the lines of other subscribing railroad members and on the lines of non-subscribing railroads. In the latter event, the subscribing member delivering the freight car to a non-subscriber is responsible to the owning subscriber for the per diem rate accruing on the car while on such non-subscribing road. Reports are required from the using subscriber to the owning subscriber. A true and correct copy of this Agreement is attached hereto, made a part hereof and marked Exhibit "X".

14. In the course of through freight shipments originating on its lines in Pennsylvania or on the lines of CNJ in New Jersey, defendant's diesel locomotives and freight cars were run on fixed routes and regular schedules in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ, its parent company, in New Jersey, and for such use defendant received compensation in accordance with the Operating Agreement and Supplemental Operating Agreement, which are attached hereto as Exhibits "A" and "B", respectively.

15. Under the said Car Service and Per Diem Agreement, defendant's freight cars were regularly, habitually and/or continuously employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania. Exhibit "Y" attached hereto and made a part hereof, was compiled from reports received from such other railroads and from defendant's own records. This Exhibit shows:

(a) Statement Y-1—the number, type, cost and net book value at December 31, 1951 of defendant's freight cars so used and employed.

(b) Statement Y-2—the number of car days that such freight cars were on defendant's home road in Pennsylvania.

(c) Statement Y-3—the number of car days that such freight cars were on lines of other specified railroads which were wholly within Pennsylvania.

(d) Statement Y-4—the number of car days that such freight cars were within Pennsylvania and without Pennsylvania on lines of other specified railroads which operated within and without Pennsylvania.

(e) Statement Y-5—the number of car days that such freight cars were on lines of other specified railroads which operated wholly without Pennsylvania.

(f) Statement Y-6—an allocation within and without Pennsylvania of the value of such freight cars on a car day ratio basis thereby resulting in an allocation of $2,383,155.00 of value to Pennsylvania and $7,697,445.00 of value outside of Pennsylvania.

16. As to freight cars of defendant so used and employed as indicated in Paragraph 15 herein, Exhibit "Z" attached hereto and made a part hereof, shows that application of the car day ratio basis to the average value of such freight cars for the year results in an allocation of $2,417,474 of average value to Pennsylvania and an allocation of $7,808,295 of average value outside of Pennsylvania.

17. On the basis of a detailed examination, study and review of its own records and of reports to defendant for the month of March 1951 (referred to in Paragraphs 13 and 15 herein) made by other railroads on whose lines defendant's freight cars were used and employed, it was determined that the total number of

defendant's freight cars so used and employed was 3,074; that 1,024 units were *at all times* during that month on roads operating wholly without Pennsylvania; that 2,049 units were at some time during that month on roads operating within and without Pennsylvania; and that one unit was at all times during that month on roads operating wholly within Pennsylvania. It is the best judgment and opinion of defendant that such situation represented the average use and employment of its freight cars on the lines of other railroads at all times throughout the year 1951.

18. Some of defendant's locomotives were used and employed on fixed routes and regular schedules on the railroad lines of CNJ, its parent company, operated outside of Pennsylvania and for such use defendant received compensation from CNJ, pursuant to the Operating Agreement and Supplemental Operating Agreement, which are attached hereto as Exhibits "A" and "B". Exhibit "Z" attached hereto and made a part hereof, shows an allocation within and without Pennsylvania on a mileage operated ratio basis of the average value of defendant's locomotives so used and employed, thereby resulting in an allocation of $1,908,381 of average value to Pennsylvania and an allocation of $1,466,160 of average value outside of Pennsylvania.

19. From its freight cars while used and employed on the lines of other railroads, as referred to in Paragraphs 13, 15 and 17 herein, defendant received aggregate per diem car hire of $1,780,679.25. On the basis of reports made to it by the using railroads, defendant, in Exhibit "AA" attached hereto and made a part hereof, has determined the number of total car hire days and has allocated the per diem car hire within and without Pennsylvania as follows:

(a) Statement "AA-1"—The per diem car hire paid by specific railroads operating in and out of

Pennsylvania is allocated on the basis of the road mileage ratio of each within and without Pennsylvania, thereby allocating car hire of $237,048.60 to Pennsylvania and $439,382.40 outside of Pennsylvania.

(b) Statement "AA-2"—The per diem car hire paid by specific railroads operating wholly within Pennsylvania is allocated in its entirety to Pennsylvania.

(c) Statement "AA-3"—The per diem car hire paid by specific railroads operating wholly without Pennsylvania is allocated in its entirety outside of Pennsylvania.

(d) Statement "AA-4"—The total per diem car hire allocated to Pennsylvania is $281,360.35 and the total per diem car hire allocated outside of Pennsylvania is $1,499,318.90.

20. In its capital stock tax report for 1951 filed by defendant with the Department of Revenue and/or at a conference with the representatives of the tax departments prior to the tax settlement, defendant submitted data and claimed that the average proportionate value of its diesel locomotives in the amount of $1,466,160 and the average proportionate value of freight cars in the amount of $7,808,295, which were regularly, habitually and/or continuously employed on the lines of other railroads outside of Pennsylvania, were not subjected to tax under the capital stock tax statute or were beyond the power and jurisdiction of Pennsylvania to subject to a property tax such as the capital stock tax.

21. On October 27, 1952, the Department of Revenue settled and, on October 29, 1952, the Department of the Auditor General approved settlement of capital stock tax against defendant for the year 1951 wherein defendant's claims in respect to its diesel locomotives and

freight cars were not allowed but wherein defendant's claim for exemption of its investments in United States Securities was allowed. A true and correct copy of said settlement, mailed to defendant under date of November 14, 1952, is attached hereto, made a part hereof, and marked Exhibit "BB".

22. On February 11, 1953, defendant filed with the Department of Revenue its petition for resettlement of said account; and on March 18, 1954, the Departments of Revenue and Auditor General, after hearing thereon, refused the prayer of said petition for resettlement. A true and correct copy of the notice of refusal, mailed to defendant on March 19, 1954, is attached hereto, made a part hereof, and marked Exhibit "CC".

23. On May 14, 1954, defendant filed with the Board of Finance and Revenue its petition for review of the action of the taxing departments in refusing its petition for resettlement; and on October 20, 1954, the said Board, after hearing thereon, refused the prayer of said petition for review. A true and correct copy of the notice of refusal, mailed to defendant on October 21, 1954, is attached hereto, made a part hereof, and marked Exhibit "DD".

24. On December 6, 1954, defendant duly filed with the Prothonotary of Dauphin County its Appeal and Specification of Objections to said settlement and to the refusal of its petition for review by the Board of Finance and Revenue; and on December 22, 1954, defendant duly filed an appeal bond as required by law.

25. In settling capital stock tax reports of railroad companies having railroad track mileage inside and outside of Pennsylvania for the year 1951, the taxing officers allocated in and out of Pennsylvania rolling stock of the railroad by multiplying the total value

of such rolling stock by a fraction having as its numerator the track mileage outside of Pennsylvania and as its denominator the total track mileage. The capital stock tax reports filed by such railroads did not indicate that the rolling stock to which the track mileage ratio was applied included freight cars for which they received per diem car hire while on the lines of other railroads, pursuant to the provisions of the "Car Service and Per Diem Agreement", which is attached hereto as Exhibit "X", but it must necessarily be presumed that the value of such freight cars was included in the reported value of such rolling stock. It is assumed by the parties hereto that such railroad companies having railroad track mileage inside and outside of Pennsylvania pay franchise or property taxes to the other states in which a portion of the railroad track mileage is located.

26. CNJ received a certificate of authority from the Commonwealth of Pennsylvania on April 2, 1912, stating as its purpose "the operation of a railroad". During the year 1951, CNJ rented two offices in Pennsylvania at Philadelphia and Pittsburgh and used defendant's office at Wilkes-Barre from which it solicited railroad freight business. During 1951, CNJ received compensation from defendant for use of freight cars on a per diem basis as per Exhibit "X" and for the use of diesel locomotives pursuant to Exhibit "A" and "B" which were used on scheduled runs from points in New Jersey over the tracks of CNJ to points in Pennsylvania over the tracks of defendant. The said CNJ filed franchise and corporate net income tax reports with the Commonwealth of Pennsylvania for the year 1951 on which it reported that no business was transacted within Pennsylvania during the year. Defendant objects to the materiality and relevancy of the facts set forth in this paragraph.

27. In the event that the tax settlement against defendant is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against the defendant in the amount of $97,271.64 which, having been paid, should be marked satisfied.

28. In the event that defendant's tax appeal is sustained in its entirety, it is agreed that its capital stock tax liability for 1951 should be determined and computed as follows:

Total assets per report		$25,168,264.00
Add: Depreciated value of freight cars fully amortized at December 31, 1951		2,484,910.00
Total: assets—adjusted		$27,653,174.00
Less: United States securities	$1,[illegible]471	
Average value of diesel locomotives outside of Pennsylvania	1,466,160	
Average value of freight cars outside of Pennsylvania	7,808,295	$11,126,926.00
Numerator		$16,526,248.00
Denominator—adjusted total assets		$27,653,174.00
Computation— $\frac{16,526,248}{27,653,174} \times 21,000,000$	=	$12,550,140.00
Tax at five mills	=	$62,750.70
Tax settled and paid	=	$97,271.64
Tax overpaid	=	$34,520.94

and that judgment should be entered in favor of the Commonwealth and against the defendant in the

amount of $62,750.70 which, having been paid, should be marked satisfied and a credit of $34,520.94, representing tax overpayment by defendant, should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General.

29. The parties hereto reserve the right to introduce additional evidence, not inconsistent herewith, into the record at the time of trial; and to object to the relevancy or materiality of any such additional evidence offered into the record and to any of the facts contained in the preceding paragraphs herein.

/s/ GEORGE W. KEITEL

Deputy Attorney General of the Commonwealth of Pennsylvania

HULL, LEIBY AND METZGER
By ROY J. KEEFER

Attorneys for Defendant

EXHIBIT "A"

Operating Agreement

(Omissions by Agreement of Counsel as indicated)

AGREEMENT

Between

WALTER P. GARDNER

Solely as Trustee of the property of
The Central Railroad Company of New Jersey,
Debtor

AND

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OPERATING AGREEMENT

Dated August 5, 1946

AGREEMENT made as of August 5, 1946 by and between Walter P. Gardner, Trustee of the property of The Central Railroad Company of New Jersey, a New Jersey railroad corporation (hereinafter sometimes called "Central"), and Central Railroad Company of Pennsylvania, a Pennsylvania railroad corporation (hereinafter sometimes called "Pennsylvania").

WITNESSETH:

WHEREAS, pursuant to Lease Agreement executed contemporaneously herewith and dated as of this date from Central to Pennsylvania, effective immediately Pennsylvania will begin to operate the lines of railroad theretofore operated by Central in the Commonwealth of Pennsylvania west from State Line Junction at the New Jersey-Pennsylvania border,

WHEREAS, Central will continue to operate its lines of railroad in the State of New Jersey east of said State Line Junction, and

WHEREAS, The parties desire, for the convenience of passengers, shippers, and the public generally, to continue existing through freight and passenger service over their respective lines and otherwise to promote economical and efficient operation of their respective lines.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, the parties covenant and agree as follows:

SECTION 1. In order to continue the existing through freight and passenger service over their respective lines, Central shall operate such through service in New Jersey to and from the State Line Junction, and Pennsylvania shall operate such through service in Pennsylvania to and from the State Line Junction. Each party shall furnish its fair share of the locomotives and other equipment necessary to operate such service and, where efficient and economical operation so requires, shall temporarily lease locomotives and other equipment to the other party to enable the latter to perform its obligations under this Agreement. To this end whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and be operated by such other party until returned to the former's line, and the latter shall pay the former rent for each such locomotive or unit of other equipment as hereinafter provided. Any locomotive so leased shall be leased upon a fully found basis, that is to say, except as otherwise provided in Sections 8 and 9 hereof, the lessor shall be responsible for and shall bear the entire cost arising from the own-

ership, maintenance and operation thereof and the lessor shall reimburse the lessee for any such expense incurred by the lessee.

SECTION 2. Central shall pay rent for locomotives temporarily leased by it from Pennsylvania under this Agreement at the following rates per locomotive mile: (specified rates for different classes of locomotives are omitted).

SECTION 3. Pennsylvania shall pay rent for locomotives leased by it from Central under this Agreement at the following rates per locomotive mile: (specified rates for different classes of locomotives are omitted).

SECTION 4. The rates set forth in Sections 2 and 3 above have been determined in the manner provided in Schedule A hereto annexed and shall be reviewed at any time at the request of either party, but at least once in each year. In the event such review indicates that any such rate no longer conforms to said Schedule A due to increases or decreases in the various items specified therein, said rates shall be revised accordingly.

SECTION 5. Each party shall pay rent for rolling stock leased by it from the other party under this Agreement at the following rates:

(a) For passenger and freight cars at the rates set forth in the then currently effective Code of Per Diem Rules of the Association of American Railroads, except that the lessee shall not be liable for rent in respect of any such cars in its possession awaiting or undergoing Class 1 or Class 2 repairs.

(b) For caboose cars at the rate of $1.75 per day; and

(c) For all other equipment at the rates provided in the then currently effective Joint Circular of Equip-

ment Rental Rates of the General Managers Association of New York, or, if not so provided, at rates determined in accordance with the principles upon which the rates therein provided have been established.

SECTION 6. Repairs to freight and passenger cars leased under this Agreement (other than Class 1 and Class 2 repairs) shall be made by the lessee thereof in accordance with the then currently effective Code of Rules Governing the Condition of, and Repairs to, Freight and Passenger Cars of the Association of American Railroads, and the lessor shall pay the lessee for such repairs in accordance with said Code of Rules. (Remainder of paragraph omitted.)

SECTION 7. Revenues from all through passenger traffic covered by this Agreement (including revenues from passengers, baggage, mail, express, newspapers and any other class of traffic ordinarily transported in passenger train service) shall be divided in accordance with the then currently effective Passenger Fare Division Basis No. 1—General Principles, published in the Official Digest of Passenger Division Requirements, and revenue from all through passenger traffic on any class of traffic not specifically provided for therein shall be divided on a mileage pro rate basis, using actual distance for each line.

SECTION 8. Revenues from all through freight traffic shall be divided in accordance with the Divisions of Joint Rates set forth in Schedule B to this Agreement. (Schedule B omitted by agreement of counsel.)

SECTION 9. In the interest of economy and efficiency, certain of the officers of the respective parties and certain of the subordinates of such officers may be officers and employees both of Central and of Pennsylvania. In such cases Central shall pay the salaries, wages, and personal and office expenses of such officers and em-

ployees (including Railroad Retirement and Unemployment Taxes, vacation expenses and the cost of owning, maintaining and operating general office facilities) and Pennsylvania shall reimburse Central to the extent of 32% thereof in respect of such officers and employees in its freight and passenger traffic departments and 22% thereof in respect of such officers and employees in all other departments.

Any other employee of either party may be used by the other party for the purpose of enabling the latter to perform its obligations hereunder and the latter shall reimburse the former for the salaries or wages of any such employee and for any other expenses and charges that may arise out of the employer-employee relationship while such employee is being so used by such other party. Each party shall reimburse the other party for any wage or so called penalty payment made by the latter to any employee as a result of the conduct of the former while it is using such employee under this Agreement.

SECTION 10. As between the parties, each party shall be solely responsible for personal injury or death suffered by any passenger, employee or other person or for loss or damage to property of any person, firm or corporation (including the parties) occurring on the line of such party, whether or not any locomotive or other unit of equipment leased to such party under this Agreement or the handling of through service under this Agreement shall have been involved therein. The foregoing shall apply notwithstanding that such liability may have been caused by the negligence or misconduct of an employee of the other party, whether or not such employee was at the time being used by the former party.

SECTION 11. Wherever in this Agreement locomotives or other units of equipment are described as being

the property of one of the parties such description shall include all locomotives and other units of equipment owned or being purchased by such party under conditional sale agreement or equipment trust lease and agreement, and, in the case of Pennsylvania, shall also include all locomotives and other units of equipment then leased by it under said Lease Agreement executed contemporaneously herewith; and wherever in any other Section of this Agreement any locomotive or other unit of equipment is described as being leased or temporarily leased to one of the parties, such term shall mean only temporary leasing under this Agreement.

SECTION 12. This Agreement shall become effective at 12:01 A.M. August 5, 1946 and shall continue throughout the term of said Lease Agreement executed contemporaneously herewith and any renewals of said term.

Sections 13, 14 and 15 are omitted by agreement.

IN WITNESS WHEREOF, Walter P. Gardner, Solely as Trustee of the property of The Central Railroad Company of New Jersey, Debtor, and not individually, has executed and affixed his seal to this Agreement and Central Railroad Company of Pennsylvania has caused this Agreement to be executed by its proper officers and its corporate seal to be hereunto affixed, all as of the day and year first above written.

/s/ WALTER P. GARDNER, L.S.

Witness:

/s/ E. T. MOORE

Walter P. Gardner
Solely as Trustee of the property of The Central Railroad Company of New Jersey, Debtor, and not individually

Commonwealth's Exhibit No. 8
Exhibit "A"

Attest:

/s/ M. M. SANDERSON
Assistant Secretary
(SEAL)

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA
By /s/ WM. WYER
President

(Two affidavits are omitted by agreement.)

SCHEDULE A

The mileage rental rate for each class of locomotives of each party shall be computed separately on the basis of the expenses of ownership, maintenance and operation set forth below. Such rate in each case shall be the sum of such items as to each such class of locomotives divided by the aggregate normal annual mileage thereof.

(a) *Return on Investment*

4½% per annum on the depreciated value of such class of locomotives.

(b) *Taxes*

For Central's locomotives of each class, 3% per annum on the value thereof as assessed under the New Jersey Railroad Tax Law.

For Pennsylvania's locomotives of each class, 5 mills per annum on the depreciated value thereof.

(c) *Depreciation*

Annual depreciation on such class of locomotives based on the rate therefor approved by the Interstate Commerce Commission.

(d) *Repairs*

The average annual cost for the two preceding years for each such class of locomotives adjusted to allow for subsequent changes in wages and material costs. In computing such average annual cost appropriate allowances shall be made for Railroad Retirement and Unemployment Taxes, vacation expenses, use of facilities, and local supervision.

(e) *Fuel*

Average annual consumption of such class of locomotives at current fuel costs adjusted by adding appropriate allowances for through freight charges and handling.

(f) *Water*

Cost assigned on the basis of the ratio of the average annual fuel consumption of such class of locomotives to that of all classes of locomotives of such party.

(g) *Lubricants, Other Locomotive Supplies and Engine House Expense*

Cost assigned on the basis of the ratio of the aggregate tractive effort of such class of locomotives to that of all classes of locomotives of such party. Such cost shall include appropriate allowances for Railroad Retirement and Unemployment Taxes, use of facilities and local supervision.

Commonwealth's Exhibit No. 8
Exhibit "B"

EXHIBIT "B"

Supplemental Operating Agreement

(Omitted by Agreement of Counsel.)

EXHIBIT "C"

List of Principal General Officers of CNJ, Titles and Locations

DIRECTORS

Name of director (a)	Office address (b)	Date of beginning of term (c)	Date of expiration of term (d) *	Number of voting shares owned of record (e)	Remarks (f)
Revelle W. Brown	Reading Term., Phila., Pa.	12/3/51	12/1/52	10(B)	*-Or until
J. Hamilton Cheston	1212 Market St. "	"	"	10(B)	others are elected
J. A. Fisher	Reading Ter., Phila., Pa.	"	"	5(B)	
Frank C. LaGrange	61 Broadway, N. Y.	"	"	2600(A)-200(B)	
Earl T. Moore	143 Liberty St., N. Y.	"	"	5(B)	
Fred N. Oliver	110 E. 42nd St., N. Y.	"	"	100(A)	
Julius A. Rippel	744 Broad St., Newark, N. J.	"	"	1000(A)	
James E. Smith	Fort Ave. & Woodall St., Baltimore, Md.	"	"	40(A)-210(B)	
Roy B. White	c/o B. & O. RR, Balto., Md.	"	"	100(B)	

A—Class A Stock
B—Class B Stock

*—The Executive Committee can exercise all the powers of the Board which can be lawfully delegated and has general supervision of the affairs of the Company.

Give the names and titles of all *officers* of the *Board of Directors* in control of the respondent at the close of the year:

Chairman of board — Roy B. White — Secretary (or clerk) of board — Wm. Kohler

Name the members of the *executive committee* of the *Board of Directors* of the respondent at the close of the year (naming first the chairman), and state briefly the powers and duties of that committee:

*—Revelle W. Brown, J. Hamilton Cheston, Fred N. Oliver

PRINCIPAL GENERAL OFFICERS OF CORPORATION, RECEIVER, OR TRUSTEE

Title of general officer (a)	Department or departments over which jurisdiction is exercised (b)	Name of person holding office at close of year (c)	Number of voting shares owned of record (d)	Office address (e)
GENERAL OFFICERS OF CORPORATION				
Chairman of Board	Executive	R. B. White	100	Baltimore, Md.
President	"	E. T. Moore	5	143 Liberty St., New York
Vice Pres. & Gen. Mgr.	Trans.-Mech.	N. N. Baily		Jersey City, N. J.
Vice Pres. & Gen. Csl.	Legal	J. C. McLester, Jr.		143 Liberty St., New York
Sec'y & Treas'r	Treasury	Wm. Kohler	40	"
Chief Frt. Traf. Off.	Freight Traffic	D. Y. Smith		"
Chief Acctg. Off'r	Accounting	R. E. Thompson		Jersey City, N. J.
Chief Engineer	Engineering-Mtce.	S. L. Mapes		"
Property Manager	R. E. Tax—Val.	P. M. Parker		"
Purchasing Agent	Purch. & Stores	G. R. Merryman		143 Liberty St., New York
Pass. Traf. Mgr.	Traffic	H. E. Yerkes		"
Comptroller	Accounting	P. M. Kelly		Jersey City, N. J.
Executive Assistant to President		H. W. Dorigan		143 Liberty St., New York
Medical Director	Medical	Dr. Ira Goldowsky		Jersey City, N. J.

EXHIBIT "D"

List of Principal General Officers of Defendant, Titles, and Locations

DIRECTORS

Name of director (a)	Office address (b)	Date of beginning of term (c)	Date of expiration of term (d) *	Number of voting shares owned of record (e)	Remarks (f)
Percy A. Brown	Wilkes-Barre, Pa.	Jan. 16/51	Jan. 15/52	1	*-Or until
Revelle W. Brown	Philadelphia, Pa.	"	"	1	others are elected
James D. Carpenter, Jr.	Jersey City, N. J.	"	"	1	and qualified
Edward J. Fox, Jr.	Easton, Pa.	"	"	1	
John W. Kress	Newark, N. J.	"	"	1	
Horace Lehr	Easton, Pa.	"	"	1	
Earl T. Moore	New York, N. Y.	"	"	1	
Joshua A. Rich, IV	"	"	"	1	
Andrew J. Sordoni	Wilkes-Barre, Pa.	"	"	1	
James L. Stackhouse	Easton, Pa.	"	"	1	
Robert A. Young	Allentown, Pa.	"	"	1	

*—The Executive Committee can exercise all the powers of the Board which can be lawfully delegated.

Give the names and titles of all *officers* of the *Board of Directors* in control of the respondent at the close of the year:

Chairman of board — Earl T. Moore

Secretary (or clerk) of board — Wm. Kohler

Name the members of the *executive committee* of the *Board of Directors* of the respondent at the close of the year (naming first the chairman), and state briefly the powers and duties of that committee:

*—Earl T. Moore, Revelle W. Brown, John W. Kress

PRINCIPAL GENERAL OFFICERS OF CORPORATION, RECEIVER, OR TRUSTEE

Title of general officer (a)	Department or departments over which jurisdiction is exercised (b)	Name of person holding office at close of year (c)	Number of voting shares owned of record (d)	Office address (e)
GENERAL OFFICERS OF CORPORATION				
President	Executive	E. T. Moore	1	143 Liberty St., N. Y., N. Y.
Vice Pres. & G. Mgr.	Trans.-Mech.	N. N. Baily		Jersey City, N. J.
Vice Pres. & Gen. Counsel	Legal	J. C. McLester, Jr.		143 Liberty St., N. Y., N. Y.
Vice President	Freight Traffic	D. Y. Smith		"
"	Accounting	R. E. Thompson		Jersey City, N. J.
Comptroller	"	P. M. Kelly		"
Sec'y & Treas'r	Treasury	Wm. Kohler		143 Liberty St., N. Y., N. Y.
Chief Engineer	Engineering-Mtce.	S. L. Mapes		Jersey City, N. J.
Property Manager	R. E.-Taxes-Val'n	P. M. Parker		"
Purchasing Agent	Purch. & Stores	G. R. Merryman		143 Liberty St., N. Y., N. Y.
Pass. Traf. Mgr.	Traffic	H. E. Yerkes		"
Medical Director	Medical	Dr. Ira Goldowsky		Jersey City, N. J.
Executive Assistant to President		H. W. Dorigan		143 Liberty St., N. Y., N. Y.

EXHIBIT "E"

Affidavit of Defendant's President re Performance of Duties and Functions Specified in Pars. 7 and 8

COUNTY OF NEW YORK
STATE OF NEW YORK

E. T. MOORE, being duly sworn according to law deposes and says:

1. In 1951 I was President of The Central Railroad Company of New Jersey.

2. In 1951 I was President of the Central Railroad Company of Pennsylvania.

3. My office at all times during the year 1951 was located at 143 Liberty Street, New York 6, N. Y.

4. During the year 1951, subordinate officials and employees, listed on the payroll of The Central Railroad Company of New Jersey, performed functions and services for Central Railroad Company of Pennsylvania at 143 Liberty Street, New York, N. Y., Jersey Central Terminal, Jersey City, New Jersey and at off-line freight offices located at Albany, N. Y., Boston, Mass., Buffalo, N. Y., Chicago, Ill., Detroit, Mich., St. Louis, Mo., Long Branch and Newark, N. J., Cleveland, Ohio, Pittsburgh, Philadelphia and Wilkes-Barre, Penna., in accordance with the agreement dated August 5, 1946 between the said Companies. These functions and services were performed under my direction, control and supervision as President of Central Railroad Company of Pennsylvania, or under the direction, control and supervision of some other duly constituted official of Central Railroad Company of Pennsylvania.

5. The salary and other expenses incurred by these officials and employees who performed functions and

services for both The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania were distributed in accordance with the agreement dated August 5, 1946 between said Companies.

/s/ E. T. Moore

E. T. Moore

Sworn to and subscribed to before me this 28th day of December, 1956.

/s/ Mary A. McNamara

Notary Public of the State of New York

EXHIBIT "F"

Affidavit of Defendant's Vice-President and General Counsel re Performance of Duties and Functions Specified in Pars. 7 and 8

COUNTY OF NEW YORK
STATE OF NEW YORK

JUDSON C. MCLESTER, JR., being duly sworn according to law deposes and says:

1. As of December 1, 1951, I was elected Vice-President and General Counsel of The Central Railroad Company of New Jersey and prior thereto I was General Counsel of said Company.

2. As of December 1, 1951 I was elected Vice-President and General Counsel of the Central Railroad Company of Pennsylvania and prior thereto I was General Counsel of said Company.

3. My office was at all times during the year 1951 located at 143 Liberty Street, New York 6, N. Y.

4. During the year 1951, subordinate officials and other employees in the Legal Department, who were on the payroll of The Central Railroad Company of New Jersey, performed services for Central Railroad Company of Pennsylvania under my direction, control and supervision as Vice-President and General Counsel of Central Railroad Company of Pennsylvania in accordance with agreement dated August 5, 1946 between The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania. These services included the General Claim Division whose functions are the processing of claims for damages to persons and property and the Freight Claim Division with similar functions with respect to claims for damages to freight.

Commonwealth's Exhibit No. 8
Exhibit "F"

5. The salary and other expenses incurred by these officials and employees who performed functions and services for both The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania were distributed in accordance with the agreement dated August 5, 1946 between the said Companies.

/s/ JUDSON C. MCLESTER, JR.

Judson C. McLester, Jr.

Sworn to and subscribed before me this 28th day of December, 1956.

/s/ MARY A. MCNAMARA

Notary Public

EXHIBIT "G"

Schedule of Wages and Salaries Billed by CNJ to, and Reimbursed By, Defendant

1951		*January*	*February*	*March*	*April*	*May*	*June*	*July*	*August*	*September*	*October*	*November*	*December*
Medical	Jersey City	$ 282.34	$ 226.87	$ 264.67	$ 258.05	$ 278.31	$ 277.20	$ 253.32	$ 291.08	$ 241.96	$ 289.84	$ 269.25	$ 254.11
Superintendent Mail	Jersey City	176.50	166.30	191.41	182.95	198.56	191.25	217.46	199.66	171.80	207.12	196.23	182.09
Superintendent Fuel	Jersey City	216.92	216.92	223.48	216.92	228.01	228.01	228.01	228.01	228.01	228.01	228.01	228.01
Superintendent Fuel	Jersey City	341.46	223.48	234.35	229.17	234.20	363.24	389.10	373.50	349.22	373.50	361.36	356.69
Car Movement	Jersey City	440.44	386.60	478.64	416.59	481.91	436.95	465.72	502.38	434.11	504.58	458.17	456.44
Audit Passenger Traffic	Jersey City	1,810.60	1,586.37	1,969.43	1,799.90	1,901.29	1,816.34	1,819.00	1,902.94	1,641.91	1,973.57	1,837.23	1,734.74
Audit Freight Traffic	Jersey City	7,042.64	6,177.98	7,417.92	7,006.32	7,574.16	7,277.01	7,306.80	7,404.36	6,557.41	7,914.87	7,293.36	6,856.31
Comptroller	Jersey City	2,780.71	2,505.98	2,976.01	2,870.16	3,004.36	2,837.11	2,837.13	2,827.22	2,684.42	3,098.43	2,930.75	2,835.30
Car Accounting	Jersey City	3,294.47	2,902.77	3,572.61	3,405.55	3,610.99	3,568.99	3,589.48	3,531.87	3,304.26	3,883.83	3,579.40	3,435.31
Audit Dis.	Jersey City	6,124.56	5,434.86	6,547.09	6,151.55	6,528.72	6,229.68	6,343.59	6,372.79	5,684.16	6,744.52	6,283.23	5,909.63
Chief Executive Office	New York	304.17	287.65	322.14	315.30	329.48	322.43	324.72	338.88	310.55	338.88	324.72	317.63
General Claim	Jersey City	907.69	893.15	891.46	905.85	937.08	929.24	943.56	963.80	889.68	978.10	945.76	926.20
(Under Law Department in New York)													
Property	Jersey City	1,263.53	1,210.48	1,365.27	1,308.52	1,235.71	1,186.44	1,229.88	1,252.96	1,278.82	1,450.49	1,272.31	1,333.49
Electrical Engineer	Jersey City	359.57	333.64	374.08	364.76	381.06	371.44	426.99	396.28	357.60	396.29	.....	.....
Freight Claim	New York	1,070.76	973.63	1,142.22	1,114.08	1,186.77	1,138.63	1,209.40	1,295.65	1,135.21	1,259.64	1,146.77	1,112.87
Treasurer	New York	733.62	656.94	829.39	765.26	815.83	789.07	796.30	867.71	757.81	845.17	795.38	772.55
Law	New York	568.35	503.26	605.44	586.32	574.26	551.77	560.94	601.60	513.28	599.30	558.41	532.70
Purchasing	New York	811.94	735.57	963.39	886.53	927.88	933.34	963.76	1,013.19	854.05	1,071.05	922.39	901.45
TOTAL GENERAL OFFICES		28,530.27	25,422.45	30,369.00	28,783.78	30,428.58	29,448.14	29,905.16	30,363.88	27,394.26	32,157.20	29,402.73	28,145.52
Passenger Traffic	New York	2,332.97	2,152.96	2,393.16	2,306.51	2,475.91	2,496.33	2,552.06	2,621.50	2,358.79	2,631.72	2,455.33	2,403.31
Freight Traffic	New York	10,969.74	10,341.75	11,327.36	11,107.02	11,465.69	11,232.08	11,478.61	11,892.59	10,761.61	11,526.84	11,364.53	11,316.52
TOTAL TRAFFIC		13,302.71	12,494.71	13,720.52	13,413.53	13,941.60	13,728.41	14,030.67	14,514.09	13,120.40	14,158.56	13,819.86	13,719.83
Superintendent Motor Power	Elizabethport, N. J.	2,146.97	2,028.32	2,310.25	2,175.65	2,341.08	2,260.57	2,299.91	2,417.44	2,082.53	2,461.65	2,807.18	2,740.15
Executives	New York	7,284.40	7,284.40	7,284.40	7,284.40	7,146.90	7,229.40	7,229.40	7,229.40	7,229.40	7,229.40	7,229.40	7,229.40
Executives	Jersey City	6,820.14	6,719.68	6,799.25	6,846.18	6,846.18	6,727.45	6,609.35	6,643.88	6,577.82	6,461.22	6,670.23	6,780.23
Chief Oper. Office	Jersey City	3,097.85	2,995.66	3,294.40	3,100.79	3,106.70	3,080.03	3,067.55	3,336.61	2,909.22	3,210.38	2,952.29	2,920.97
Porters-Exp. Building	Jersey City	248.24	255.63	318.03	314.49	303.69	303.69	292.93	228.69	231.24	326.34	331.48	316.80
TOTALS		$61,430.58	$57,200.85	$64,095.85	$61,918.82	$64,114.73	$62,777.69	$63,434.97	$64,739.99	$59,544.87	$66,004.75	$63,213.17	$61,852.90

Grand Total $750,329.17

EXHIBIT "H"

More Specific Schedule of Wages and Salaries Billed by CNJ to, and Reimbursed by, Defendant

(1951) SALARY AND WAGES PAID BY C.P.R. CO. OF N. J. FOR ACCOUNT OF C.R.P.

Department	*Location*	*Amount*
Executive	New York City	$86,890.30
"	Jersey City	80,507.61
Passenger Traffic	New York City	20,180.55
Freight Traffic	Albany, N. Y.	5,666.87
" "	Philadelphia, Pa.	6,585.51
" "	Buffalo, N. Y.	5,336.51
" "	Cleveland, Ohio	5,562.12
" "	Long Branch, N. J.	4,328.52
" "	Newark, N. J.	8,219.67
" "	Boston, Mass.	9,428.30
" "	St. Louis, Mo.	4,273.78
" "	Pittsburgh, Pa.	7,258.48
" "	Chicago, Ill.	8,573.05
" "	Detroit, Mich.	3,428.66
" "	Wilkes-Barre, Pa.	1,401.60
" "	New York City	64,721.27
General Offices—New York:		
Chief Executive Officer		3,836.55
Freight Claim		13,785.63
Treasurer		9,425.03
Law		6,755.63
Purchasing		10,984.55
General Offices—Jersey City:		
Medical		3,187.90
Supt. of Mail		2,281.33
Supt. of Fuel		6,527.59
Car Movement Bureau		5,462.53
Auditor of Passenger Traffic		21,793.32
" " Freight Traffic		85,829.14
Comptroller		34,187.58
Car Accounting		41,679.53
Auditor of Disbursements		74,354.38
General Claim		11,111.57
Property		15,387.90
Electrical Engineer		3,761.71
Chief Operating Officer		37,072.45
Cleaning (Porters)		3,471.25
General Offices—Elizabethport:		
Supt. of Motive Power		28,071.70
		$750,329.17

EXHIBIT "I"

Billing by CNJ to Defendant for Wages and Salaries and Distribution Thereof by Defendant to Its Accounts

---

TO: THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

FOR FURTHER INFORMATION ADDRESS: COMPTROLLER, JERSEY CITY 2, N. J.

BILL NO. .....

PLEASE QUOTE BILL NUMBER IN CORRESPONDENCE AND WHEN REMITTING

For CRP proportion of salaries and taxes of Joint Officers and employes, month of July, 1951 distribution as follows:—

Executive Roll	$13,838.75	
General Office Rolls	29,905.16	
Traffic Dept. Rolls	14,030.67	
Motive Power Office	2,299.91	
Chief Operating Officer etc.	3,067.55	
Porters in Express Bldg.	292.93	
	$63,434.97	
RUI & RRA	3,806.10	
		$67,241.07

Credit

DISTRIBUTION:

$67,241.07

AMOUNT | DATE MADE | BILL NO.

A. D.

DEPT. | NO. | MONTH'S ACCTS. | CODE

Central Railroad Company of Pennsylvania

MAKE REMITTANCE TO: TREASURER: THE CENTRAL R. R. CO., OF N. J., 143 LIBERTY ST., NEW YORK 6, N. Y.

NOTICE: PLEASE DETACH THIS PART AND FORWARD WITH YOUR REMITTANCE. IF PAID BY CHECK YOUR CANCELLED CHECK WILL BE YOUR RECEIPT

Commonwealth's Exhibit No. 8
Exhibit "I"

EXHIBIT "I"—Continued

CRP Proportion of Joint Payroll Items

Month of July 1951

a/c			Executive Roll	Genl. Office Rolls	Traffic Dept. Rolls	Motive Power Engr. M of W Genl. Mgr. & Porters	Total
Dr:							
W&S	201	Und.	$1,435.22	$213.49	.....	$410.32	$2,059.0
"	247	"	29.33	.....	.....	.....	29.3
"	274	"	36.58	38.00	.....	.....	74.5
						410.32	
M of E	301	Und.	900.50	149.45	.....	2,299.91	3,760.3
"	332	"	36.58	38.00	.....	.....	74.5
Traffic	351	Pass.	667.20	.....	1,412.78	.....	2,079.9
	351	Frt.	2,641.08	.....	4,951.28	.....	7,592.3
	352	Pass.	.....	.....	855.46	.....	855.4
	353	Pass.	.....	.....	283.83	.....	283.8
	352	Frt.	.....	.....	6,247.09	.....	6,247.0
	358	Frt.	.....	.....	280.23	.....	280.2
				64.05		980.16	
T.R.L.	371	Und.	979.47	389.10	.....	410.33	2,823.1
	371	Frt.	.....	465.72	.....	.....	465.7
	371	Pass.	64.90	217.46	.....	.....	282.3
	407	Und.	29.33	.....	.....	.....	29.3
	420	Und.	170.69	177.32	.....	.....	348.0
Genl.	451	Und.	4,442.54	.....	.....	.....	4,442.5
	451	Pass.	118.80	.....	.....	.....	118.8
	451	Frt.	392.70	.....	.....	293.93	392.7
	452	Und.	.....	16,064.66	.....	856.42	17,214.0
	452	Pass.	.....	1,819.00	.....	.....	1,819.0
	452	Frt.	.....	8,516.20	.....	.....	8,516.2
	454	Und.	1,586.93	560.94	.....	.....	2,147.8
Susp. Gen'l Store Exp.			306.90	1,191.77	.....	.....	1,498.6
Total			$13,838.75	$29,905.16	$14,030.67	$5,660.39	$63,434.9
RRA & RUI Tax			.....	.....	.....	.....	3,806.1
Cr. N.S. CNJ							$67,241.0

EXHIBIT "I"—Continued

| | | |

EXHIBIT "J"

Schedule of Rentals Paid by CNJ, Billed to, and Reimbursed by, Defendant

	Rents 1951		*Distribution* CNJ	CRP
New York				
143 Liberty St.				
Annual Rent	$52,000			
Electricity	3,250			
		$55,250	$40,541.84	$14,708.16
Albany, N. Y.				
Room #11, The Plaza				
Annual Rent	570			
Electricity	12			
		582	395.76	186.24
Boston, Mass.				
Rooms 406-407 Boston Chamber of Commerce Bldg.				
Annual Rent	1,725	1,725	1,173.00	552.00
Buffalo, N. Y.				
Room 532 and Part Room 530 Ellicott Square Bldg.				
Annual Rent		1,248	848.64	399.36
Chicago, Ill.				
Room 3324 Bankers Bldg.				
Annual Rent		2,136	1,452.48	683.52
Detroit, Mich.				
Rooms 622-623 Lafayette Bldg.				
Annual Rent		1,440	979.20	460.80
St. Louis, Missouri				
Rooms 1035-1036 Boatmens' Bank Bldg.				
Annual Rent	1,100			
Light and Power ...	48			
		1,148	769.16	367.36
Long Branch, N. J.				
Room on second floor office bldg. NY&LB RR				
Annual Rent		300	204.00	96.00
Pittsburgh, Pa.				
Rooms 801-802 Bark Bldg.				
Annual Rent		1,764	1,199.52	564.48
Philadelphia, Pa.				
Room 1610 Girard Trust Bldg.				
Annual Rent		1,980	1,346.40	633.60
Cleveland, Ohio				
Rooms 406-407 Park Bldg.				
Annual Rent		1,200	816.00	384.00

EXHIBIT "K"

Voucher of CNJ Authorizing Rental Payment for Premises at 143 Liberty Street, New York, N. Y.

February 15, 1951

143 Estates, Inc.
15 Park Row
New York, N. Y.

For rent of space on the 2nd, 7th, 8th and 9th floors in the building known as 143 Liberty Street, New York, N. Y.

March 1, 1951 to April 1, 1951	$4,333.33
Electric Current	270.83
CRP	$4,604.16

Dr:	201 Und	$87.29	$19.20
	351 Frt	1,449.32	463.78
	351 Pass	678.47	217.11
	453 Und	1,298.16	285.60
	454 Und	863.18	190.00
	Genl. Stx	227.24	49.99

Approved for payment:

Charge: None

P. M. PARKER

Property Manager

Dr.	Auditor Disbursements No. 54015	Cr.
$87.29	M of W & S—201-281	
	M of Equip.—301-340	
$2,127.79	Traffic—351-359	
	TRL—371-420	
	Misc. Oper.—441-448	
2,161.84	General—451-462	
4,376.92	Total Expenses	
	Material	
227.24	Suspense Accounts	
	Invest. in Road and Equip. — Road	
	Equipment	
	Operating Exp.	
	Sdry. Cos. & Inds.	
	A & B Suspense	
	A.F.T. Transfer	
	A.P.T. Transfer	
	Comptroller Transfer	
	Collectible Accounts	
	Payable Accounts	$4,604.16
$4,604.16	Total	

Dr.	Comptroller No.	Cr.
	General Ledger	
	Misc. Accts. Rec. "Kol-a-Mat"	
	Misc. Accts. Rec. "Mach."	
	Misc. Accts. Rec. "Other"	
	Misc. Accts. Rec. Frt. Clms. "Other"	
	Freight Traffic Rec. "Other"	
	Car Service Rec. "Other"	
	Ticket Sales Rec. "Other"	
	Misc. Accts. Pay. "Mach."	
	Misc. Accts. Pay. "Other"	
	Misc. Accts. Pay. Frt. Clms. "Other"	
	Freight Traffic Pay. "Other"	
	Car Service Pay. "Other"	
	Ticket Sales Pay. "Other"	
	Specials	
	Law Department	
	Agents	
	Agents' Remittances	
	Revenue	
	Rents	

February 15, 1951

143 Estates, Inc.
15 Park Row
New York, N. Y.

For rent of space on the 2nd, 7th, 8th and 9th floors in the building known as 143 Liberty Street, New York, N. Y.

March 1, 1951 to April 1, 1951 .	$4,333.33
Electric Current	270.83
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Dr:	201 Und	$87.29	$19.20
	351 Frt	1,449.32	463.78
	351 Pass	678.47	217.11
	453 Und	1,298.16	285.60
	454 Und	863.18	190.00
	Genl. Stx	227.24	49.99

Approved for payment:

Charge: None

P. M. PARKER

Property Manager

Dr.	Auditor Disbursements No. 54015	Cr.
$87.29	M of W & S—201-281	
	M of Equip.—301-340	
$2,127.79	Traffic—351-359	
	TRL—371-420	
	Misc. Oper.—441-448	
2,161.84	General—451-462	
4,376.92	Total Expenses	
	Material	
227.24	Suspense Accounts	
	Invest. in Road and Equip. — Road	
	Invest. in Road and Equip. — Equipment	
	Invest. in Road and Equip. — Operating Exp.	
	Invest. in Road and Equip. — Sdry. Cos. & Inds.	
	Invest. in Road and Equip. — A & B Suspense	
	A.F.T. Transfer	
	A.P.T. Transfer	
	Comptroller Transfer	
	Collectible Accounts	
	Payable Accounts	$4,604.16
$4,604.16	Total	

Dr.	Comptroller No.	Cr.
	General Ledger	
	Misc. Accts. Rec. "Kol-a-Mat"	
	Misc. Accts. Rec. "Mach."	
	Misc. Accts. Rec. "Other"	
	Misc. Accts. Rec. Frt. Clms. "Other"	
	Freight Traffic Rec. "Other"	
	Car Service Rec. "Other"	
	Ticket Sales Rec. "Other"	
	Misc. Accts. Pay. "Mach."	
	Misc. Accts. Pay. "Other"	
	Misc. Accts. Pay. Frt. Clms. "Other"	
	Freight Traffic Pay. "Other"	
	Car Service Pay. "Other"	
	Ticket Sales Pay. "Other"	
	Specials	
	Law Department	
	Agents	
	Agents' Remittances	
	Revenue	
	Rents	
	A.P.T. Transfer	
	A.F.T. Transfer	
	Auditor Disbursements Transfer	
	Cash	
	Vouchers Payable	
	Total	

EXHIBIT "L"

Billing of CNJ to Defendant for its Share of Rent at 143 Liberty Street and of Other Rentals and Office Costs

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CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA

Bill 54269
Month March 1951

A.D. Dept.—Date

To: The Central R.R. Co. of N.J., Dr.

To cover C.R.P. proportion of joint items paid 100% by this Company on the following listed payments.

Voucher No.	*Name of Company*	*a/c Chargeable*	*Amount*	
34885	Pension Payrolls	457O	$176.09	
54001	C. B. Bohn Corp.	352F	38.40	
2	Bankers Bldg. Corp.	"	56.96	
5	Delaware & Hudson	"	14.72	
7	Ellicott Square Co.	"	33.28	
8	Gerard Trust Co.	"	52.80	
9	Minot DeBois & Maddison	"	46.40	
10	Monward Realty Co.	"	28.48	
12	NY & LB	351F	8.00	
13	Park Inv. Co.	352F	41.60	
14	" Bldg.	352F	50.56	
15	143 Estates Inc.	201U	19.20	
"	"	351F	463.78	
"	"	351P	217.11	
"	"	453U	285.60	
"	"	454U	190.00	
"	"	Stx	49.99	
19	Metropolitan Trfc Assn.	352F	48.00	
20	Trfc Club of J. City	"	25.60	
24	I.B.M.	453F	323.26	(1)

EXHIBIT "L"—Continued

Voucher No.	*Name of Company*	*a/c Chargeable*	*Amount*	
24	I.B.M.	453U	$684.13	(1)
27	Trfc Club of NY	352F	14.40	
28	J. Vogel Inc.	,,	14.08	
29	J. C. Powers	,,	4.73	
31	Capital Dist. Trfc	,,	25.60	
33	City of Bayonne	314F	1 —	
39	NY Tel Co.	352F	15.40	
50	Postmaster J. City	460U	5.39	
51	Union League Club of Chic.	352F	11.52	
56	J. S. Swift Co.	358F	33.66	
57	Canadian Frt Assn	,,	.42	
58	J. S. Swift Co.	,,	31.02	
62	New England Tel & Tel	352R	17.74	

Debit—Collectible a/c 3027.92

Credit—Oper. Exp. a/c

#201 Und	19.20	453 Frt	323.26	
351 Pass	217.11	453 Und	967.73	
351 Frt	471.78	454 Und	190.00	
352 Frt	540.27	457 Und	176.09	
358 Frt	65.10	460 Und	5.39	
		Stx	49.99	

Commonwealth's Exhibit No. 8
Exhibit "M"

EXHIBIT "M"

Billing of CNJ to Defendant for its Share of Stationery Costs for Joint Offices

---

To: THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

For further information address:

COMPTROLLER, JERSEY CITY 2, N. J.

BILL NO. _____

PLEASE QUOTE BILL NUMBER IN CORRESPONDENCE AND WHEN REMITTING

JULY 1951

Stationery furnished CRP facilities also CRP proportion of stationery furnished Joint Offices. $2,914.08

Credit CNJ		*Debit CRP*	
OC&I (labor)	$70.00	276 Und.	$134.82
" (material)	643.00	334 Frt.	17.62
276 Und.	90.76	334 Und.	170.98
334 Und.	144.55	358 Pass.	65.98
358 Pass.	64.09	358 Frt.	83.21
358 Frt.	81.32	410 Pass.	11.97
410 Und.	284.55	410 Und. ATRR	2.83
458 Pass.	9.44	410 Frt.	143.49
458 Frt.	825.94	410 Und.	597.24
458 Und.	659.35	410 Und.Atown.Yd.	1.67
Staty. St. Exp.	36.77	458 Pass.	9.44
RUI & RRA	4.31	458 Frt.	825.94
		458 Und.	659.35
	$2914.08	Genl.St.Exp.	185.23
		RUI & RRA	4.31
			$2914.08

DISTRIBUTION:

$2,914.08			
AMOUNT	DATE MADE	BILL NO.	
A.D.	S-605	July	
DEPT.	NO.	MONTH'S ACCTS.	CODE

Central R.R. Co. of Penna.

EXHIBIT "N"

Letterhead of Defendant—143 Liberty Street

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

• 143 LIBERTY STREET • NEW YORK 6, N. Y.
E. T. MOORE, *President* *Telephone* BArclay 7-9700

EXHIBIT "O"

Two Bank Statements to Defendant— 143 Liberty Street

STATEMENT

The Central Railroad Co. of Pa.
William Kohler, Sec. & Treas.
143 Liberty St.
New York 6, N. Y. M1

IN ACCOUNT WITH

THE EASTON NATIONAL BANK

Wilson Borough Office 1711 Washington St., Easton, Pa.

CHECKS	DEPOSITS	DATE	NO. OF CHECKS	BALANCE
10,000.00		Jun 29-51		$32,446.33
	4,412.00	Jul 2-51	1	22,446.33
8,000.00		Jul 2-51		26,858.33
	952.00	Jul 3-51	1	18,858.33
	132.00	Jul 3-51		19,810.33
	330.00	Jul 5-51		19,942.33
	4,820.00	Jul 6-51		20,272.33
	280.00	Jul 9-51		25,092.33
	1,355.00	Jul 10-51		25,372.33
	1,914.00	Jul 11-51		26,727.33
5,000.00		Jul 12-51		28,641.33
	2,035.00	Jul 13-51	1	23,641.33
	4,324.00	Jul 13-51		25,676.33
	270.00	Jul 16-51		30,000.33
5,000.00		Jul 17-51		30,270.33
	730.00	Jul 18-51	1	25,270.33
	800.00	Jul 18-51		26,000.33
	500.00	Jul 19-51		26,800.33
5,000.00		Jul 20-51		27,300.33
	4,545.00	Jul 23-51	1	22,300.33
	542.00	Jul 23-51		26,845.33
	715.00	Jul 24-51		27,387.33
	2,760.00	Jul 25-51		28,102.33
	1,645.00	Jul 26-51		30,862.33
5,000.00		Jul 27-51	3	32,458.13
	2,533.00	Jul 27-51	9997	32,507.33
	239.00	Jul 30-51	1	27,507.33
		Jul 30-51		30,040.33
38,000.	35,833.	Jul 31-51		30,279.33

TREASURER'S ACCOUNT

RECEIPTS $35,833.00 THE LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

EC—ERROR CORRECTION DM—DEBIT MEMO CC—CERTIFIED CHECK
LS—LIST OF CHECKS RT—RETURNED CHECK SC—SERVICE CHARGE
NC—NO COUNT CM—CREDIT MEMO. CL—COLLECTION

ALL ITEMS ARE CREDITED SUBJECT TO FINAL PAYMENT

PLEASE EXAMINE AT ONCE. IF NO ERROR IS REPORTED WITHIN TEN DAYS THE ACCOUNT WILL BE CONSIDERED CORRECT.

EXHIBIT "O"—Continued

THE FIRST NATIONAL BANK AND
TRUST COMPANY OF BETHLEHEM
Bethlehem, Pa.

Central Railroad Co of Penna
143 Liberty Street
New York 6, New York

DEBITS	CREDITS	DATE	NO. OF CHECKS	BALANCE
		Jun 29-51		28,040.42
5,000.00	30.00			
	976.66			
	150.00	Jul 2-51	1	24,197.08
10,000.00	1,064.45	Jul 3-51	1	15,261.53
	30.00			
	2,429.82			
	100.00	Jul 5-51		17,821.35
	20.00			
	3,315.61			
	30.00	Jul 6-51		21,186.96
	20.00			
	532.43			
	50.00	Jul 9-51		21,789.39
	20.00			
	67.43	Jul 10-51		21,876.82
	40.00			
	1,409.77	Jul 11-51		23,326.59
	1,707.65	Jul 12-51		25,034.24
	40.00			
	24.55	Jul 13-51		25,098.79
	50.00			
	40.00			
	40.00			
	2,147.52			
	40.00	Jul 16-51		27,416.31
	2,146.77	Jul 17-51		29,563.08
5,000.00	1,101.92	Jul 18-51	1	25,665.00
	70.00			
	604.46			
	20.00	Jul 19-51		26,359.46

ALWAYS OBTAIN A REGISTERED RECEIPT WHEN MAKING A DEPOSIT.
ALL ITEMS ARE CREDITED SUBJECT TO FINAL PAYMENT.

SC—SERVICE CHARGE
NC—NO CHARGE
CM—CREDIT MEMO
LST—LIST
DM—DEBIT MEMO.
CC—CERTIFIED CHECK
RT—RETURNED ITEM
EC—ERROR CORRECTED
CL—COLLECTIONS
THE LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

PLEASE EXAMINE AT ONCE: IF NO ERROR IS REPORTED IN TEN DAYS THE ACCOUNT WILL BE CONSIDERED CORRECT.

EXHIBIT "O"—Continued

Central Railroad Co of Penna
143 Liberty Street
New York 6, New York

THE FIRST NATIONAL BANK AND
TRUST COMPANY OF BETHLEHEM
Bethlehem, Pa.

DEBITS	CREDITS	DATE	NO. OF CHECKS	BALANCE
		Jul 20-51		$26,359.46
	$20.00			
	486.68	Jul 20-51		26,866.14
5,000.00	110.00			
	1,906.71			
	20.00	Jul 23-51	1	23,902.85
	20.00			
	1,184.67	Jul 24-51		25,107.52
	50.00			
	710.16	Jul 25-51		25,867.68
	1,859.33	Jul 26-51		27,727.01
5,000.00	96.96	Jul 27-51	1	22,823.97
	50.00			
	1,067.20			
	80.00	Jul 30-51		24,021.17
	20.00			
	100.00			
	230.71	Jul 31-51		24,371.88
$30,000.00	$26,331.46			

TREASURER'S ACCOUNT
RECEIPTS $26,331.46

As to charges hereon, see cancelled checks forwarded to comptroller with list.

On Aug. 8 1951 5 Items $ 30,000.00

ALWAYS OBTAIN A REGISTERED RECEIPT WHEN MAKING A DEPOSIT.
ALL ITEMS ARE CREDITED SUBJECT TO FINAL PAYMENT.

SC—Service Charge
NC—No Charge
CM—Credit Memo.
LST—List
DM—Debit Memo.
CC—Certified Check
RT—Returned Item
EC—Error Corrected
CL—Collections
THE LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

PLEASE EXAMINE AT ONCE: IF NO ERROR IS REPORTED IN TEN DAYS THE ACCOUNT WILL BE CONSIDERED CORRECT.

EXHIBIT "P"

Draft of a Railroad for Car Day Rates to Defendant at New York Address

(Omitted by Agreement)

EXHIBIT "Q"

Appointment Notices—New York and Jersey City

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

FREIGHT TRAFFIC DEPARTMENT
143 Liberty Street
New York 6, N. Y.

August 5, 1946

The following appointments are made effective this date:

M. L. McElheny, Assistant to Vice President—Freight, New York, N. Y.

Don Y. Smith, General Freight Traffic Manager, New York, N. Y.

Thomas H. Irwin, Assistant Freight Traffic Manager, New York, N. Y. (Sales and Service)

J. F. Hourigan, Assistant Freight Traffic Manager, New York, N. Y. (Rates)

J. S. Watson, General Coal Freight Agent, New York, N. Y.

Edward Keil, General Freight Agent, New York, N. Y. (Rates and Divisions)

C. N. Bissell, Assistant General Freight Agent, New York, N. Y. (Rates)

David S. Gendell, General Foreign Freight Agent, New York, N. Y.

A. L. Postlethwait, Assistant to General Freight Agent, New York, N. Y.

R. E. Rowland, Industrial Agent, New York, N. Y.

E. T. Libby, Assistant Industrial Agent, New York, N. Y.

B. J. McSweeney, General Freight Agent, New York, N. Y. (Sales and Service)

EXHIBIT "Q"—Continued

Fred H. Hicks, Assistant General Freight Agent, Girard Trust Co. Building, Philadelphia, Pa.
E. T. Ginder, Division Freight Agent, Broad Street Station Building, Newark, N. J.
H. E. Garrison, Division Freight Agent, Allentown National Bank Building, Allentown, Pa.
E. T. M. Carr, General Agent, Long Branch, N. J.
C. H. Faupel, General Western Freight Agent, Bankers Building, Chicago, Ill.
C. E. Armstrong, General Agent, Park Building, Pittsburgh, Pa.
H. W. Gruchy, New England Freight Agent, Chamber of Commerce Building, Boston, Mass.
W. D. Wakeman, General Agent, The Plaza, Albany, N. Y.
F. F. Siegel, General Agent, Park Building, Cleveland, Ohio.
C. R. Everding, General Agent, Ellicott Square, Buffalo, N. Y.
F. H. Witting, General Agent, Boatmen's Bank Building, St. Louis, Mo.
E. P. Seiwert, General Agent, National Bank Building, Detroit, Mich.
H. R. Fiest, Brooklyn City Freight Agent, New York, N. Y.

C. L. EWING,
Vice President—Freight

Approved:
WM. WYER,
President.

Commonwealth's Exhibit No. 8
Exhibit "Q"

EXHIBIT "Q"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Office of
Vice President and General Manager

Jersey City 2, N. J.
January 1, 1952

Mr. F. W. Bender will retire as Signal Engineer after more than fifty-two years of faithful service.

Mr. J. J. Coakley is appointed Signal Engineer, succeeding Mr. Bender.

Mr. E. F. Smith is appointed Assistant Signal Engineer, succeeding Mr. Coakley.

Effective this date.

N. N. Baily,
Vice President and General Manager

Approved:

E. T. Moore,
President.

EXHIBIT "Q"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OFFICE OF THE PRESIDENT

New York 6, N. Y.
August 1, 1952.

Mr. Robert L. Barbour is appointed Director of Public Relations.

Mr. N. W. James is appointed Assistant Director of Public Relations.

The Positions of Director of Publicity and Assistant Director of Publicity are abolished.

Effective this date.

E. T. MOORE,
President

Commonwealth's Exhibit No. 8
Exhibit "Q"

EXHIBIT "Q"—Continued

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

OFFICE OF THE PRESIDENT

New York 6, N. Y.
June 1, 1951.

Mr. G. R. Merryman is appointed Purchasing Agent, succeeding Mr. E. A. Workman, deceased.

Effective this date.

E. T. MOORE,
President.

Approved:

R. B. WHITE,
Chairman of the Board.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OFFICE OF THE PRESIDENT

New York 6, N. Y.
June 1, 1951.

Mr. G. R. Merryman is appointed Purchasing Agent, succeeding Mr. E. A. Workman, deceased.

Effective this date.

E. T. MOORE,
President.

EXHIBIT "Q"—Continued

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

OFFICE OF THE PRESIDENT

New York 6, N. Y.
December 1, 1951.

Mr. Joseph Lloyd is appointed to newly-created position of Director of Safety, reporting to the President.

Mr. A. L. Jenico is appointed Supervisor-Suggestion Plan.

Effective this date.

E. T. MOORE,
President.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OFFICE OF THE PRESIDENT

New York 6, N. Y.
December 1, 1951.

Mr. Joseph Lloyd is appointed to newly-created position of Director of Safety, reporting to the President.

Mr. A. L. Jenico is appointed Supervisor-Suggestion Plan.

Effective this date.

E. T. MOORE,
President.

EXHIBIT "R"

General Notices of Defendant—143 Liberty Street

(Four Omitted by Agreement of Counsel)

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OFFICE OF THE PRESIDENT

143 Liberty Street
New York 6, New York
August 5, 1946

General Notice

Effective 12:01 A.M., E.S.T., this date, Central Railroad Company of Pennsylvania will operate under lease, the lines of railroad in Pennsylvania formerly operated by The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee.

The property dividing line between Central Railroad Company of Pennsylvania and The Central Railroad Company of New Jersey will be the Pennsylvania—New Jersey state line, located between Phillipsburg, N. J., and Easton, Pa., which is designated as State Line Junction.

The principal office of Central Railroad Company of Pennsylvania is 143 Liberty Street, New York 6, New York, and the following are its principal officers:

Wm. Wyer, President
E. T. Moore, Vice President and General Manager—Operation and Maintenance
C. L. Ewing, Vice President—Freight Traffic
Wm. Kohler, Secretary—Treasurer
H. L. Kern, General Counsel

EXHIBIT "R"—Continued

F. E. Gregg, Comptroller
A. M. Zabriskie, Chief Engineer
R. E. Thompson, Property Manager
E. A. Workman, Purchasing Agent
H. E. Yerkes, Passenger Traffic Manager
I. Goldowsky, Medical Director

All other general officers of The Central Railroad Company of New Jersey are appointed general officers of Central Railroad Company of Pennsylvania, serving in the same capacity.

All officers and employes of The Central Railroad Company of New Jersey within the State of Pennsylvania, effective as of this date, will become employes of Central Railroad Company of Pennsylvania without change in seniority, rules, rates of pay, working conditions, or other terms and conditions of employment.

Central Railroad Company of Pennsylvania will carry out the obligations of The Central Railroad Company of New Jersey in all agreements and contracts involving facilities and operations on lines in Pennsylvania.

Central Railroad Company of Pennsylvania will operate under separate tariffs and all revenues and expenses will be separately recorded and accounted for.

Until further notice, annual passes and other forms of transportation issued by The Central Railroad Company of New Jersey will be valid for use on Central Railroad Company of Pennsylvania trains.

All instructions previously issued by the Trustees, Trustee, or Chief Executive Officer of The Central Railroad Company of New Jersey shall remain in effect with respect to Central Railroad Company of Pennsylvania until rescinded or modified.

WM. WYER,
President.

EXHIBIT "R"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

New York 6, New York
August 5, 1946

TO ALL FOREIGN LINES:

Effective at 12:01 A.M., E.S.T., August 5, 1946, Central Railroad Company of Pennsylvania will operate under lease the lines of railroad in Pennsylvania formerly operated by The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee.

PASSENGER TRAFFIC:

We will forward duplicate copy of new concurrence form PX3 issued by Central Railroad Company of Pennsylvania and would ask that you issue similar concurrence in favor of Central Railroad Company of Pennsylvania.

The present fares of the various classes now shown in passenger tariffs, from, to and via The Central Railroad Company of New Jersey have been adopted by Central Railroad Company of Pennsylvania and will remain in effect until changed in the usual course of business.

Inasmuch as it will be necessary to keep separate accounts for Central Railroad Company of Pennsylvania and The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee, you are requested to report separate proportions to The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania, using Phillipsburg, N. J. (State Line Junction) as the dividing point and in accordance with general principles as contained in Digest of Passenger Fare Divisions.

Present forms of interline tickets via The Central Railroad Company of New Jersey will be honored on the trains of Central Railroad Company of Pennsylvania. On future issues, "Jersey Central Lines" should be substituted for The Central Railroad Company of New Jersey on interline tickets which may be issued via any junction point on or via Central Railroad Company of Pennsylvania or The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee, except that no change will be made with the present arrangement of optional forms between New York and stations on the New York and Long Branch Railroad.

FREIGHT TRAFFIC:

You will, in the near future, receive from your appropriate Freight Traffic Officer, blanket supplements to all freight tariffs and division of revenue sheets required to make a separation of interline revenues between The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania at a point between Phillipsburg, N. J. and Easton, Pa., to be termed "State Line Junction."

Immediate instructions should be placed with your waybilling agents in connection with interline traffic passing over the Jersey Central Lines to show in the space on interline waybills set aside for routing reference, the interchange point between The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania, i.e., State Line Junction.

The date of the waybill on forwarded traffic and the junction stamp at Jersey Central Lines (CRR of NJ and CRR of Pa.) junction where overhead or passing over traffic first reaches Jersey Central Lines will govern the separation between the two companies.

EXHIBIT "R"—Continued

Separate abstracts, division of revenue sheets and interline summaries must be furnished each carrier subject to drafts drawn on William Kohler, Treasurer, Central Railroad Company of Pennsylvania, New York 6, N. Y.

Where we now have road-to-road or average gateway percentages covering interline less carload traffic either forwarded or overhead, the present percentages must be applied and revenues assigned to The Central Railroad Company of New Jersey as the separation of this revenue between the two companies will be made by The Central Railroad Company of New Jersey until such time as all road-to-road percentages are revised.

C. L. EWING,
Vice President in Charge of Freight Traffic;

H. E. YERKES,
Passenger Traffic Manager;

WM. KOHLER,
Treasurer;

F. E. GREGG,
Comptroller.

APPROVED

WM. WYER,
President.

EXHIBIT "R"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

OFFICE OF PRESIDENT

CIRCULAR No. 1

143 Liberty Street,
New York 6, N. Y.,
August 5/1946

TO OFFICERS AND EMPLOYES:

Effective 12:01 A.M., E.S.T., August 5/1946, Central Railroad Company of Pennsylvania will operate under lease the lines of railroad in Pennsylvania forferly operated by The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee.

The property dividing line between Central Railroad Company of Pennsylvania and The Central Railroad Company of New Jersey will be the Pennsylvania-New Jersey State line located 0.2 miles west of Phillipsburg Station, which is designated as State Line Junction.

The Central Railroad Company of New Jersey is hereinafter referred to as CNJ and Central Railroad Company of Pennsylvania as CRP.

EMPLOYES:

Employes located or having headquarters or home terminal in Pennsylvania will become employes of CRP. All train service employes will show on time cards their home terminal in space marked "Division." The present method of time keeping and pay roll procedure will be continued and CRP employes will receive pay checks of CRP issue. Jersey Central Lines time cards will continue to be used, adding initials CRP after location.

Information regarding the number of employes,

EXHIBIT "R"—Continued

amount of service rendered and compensation paid will be required in order to complete the monthly report to the I. C. C. for employes of the CRP.

Separate accounting records of all employes transferred to CRP will be established and the Auditor Disbursements will give all necessary notice of the change to the Social Security and Railroad Retirement Boards, and other authorities.

EQUIPMENT:

The CRP owns or has on order the following equipment:—

100 Flat cars Nos. 101 to 200
500 Hopper cars Nos. 10,001 to 10,500
1,000 Gondola cars Nos. 1,001 to 2,000
10 Diesel road frt. locomotives (on order)
125 Covered cement hopper cars Nos. 501 to 625 (on order)

Additional equipment as shown in Schedule A attached, has been leased to the CRP. The serial numbers will remain the same, the initials will be changed to CRP as soon after August 4th as possible.

Equipment used in through service will be settled for at rates agreed upon from time to time. The following bases will be used to determine rates for the several classes of equipment.

FREIGHT CARS:

Cars will be interchanged between CNJ and CRP at State Line Junction.

Use of freight cars will be settled for under regular per diem rules and the charges shall be at the standard approved rate, except that no per diem charge shall be made against either carrier for cars held at back shops

EXHIBIT "R"—Continued

on the other carrier's line, awaiting or undergoing Class 1 and 2 repairs.

STEAM LOCOMOTIVES:

One road using locomotives of the other shall pay for such use mileage rates by classes of locomotives, the amounts of which will be furnished you later.

Billing for services and materials furnished by one company to the other shall be on the following bases:—

Repairs—Actual material and labor costs, plus the appropriate shop and store expense percentages, plus 9½% for railroad retirement and unemployment tax and vacation expense, plus 13% for use of facilities and local supervision.

Fuel—Actual cost plus freight charges to point of use, plus 15c per ton for handling.

Lubricants and other supplies—Actual cost plus 15% for store expense and handling.

Engine handling—Average engine handling cost at the terminal where service is performed, divided as follows:

(a) Enginehouse expense as shown on Form MP-149, including railroad retirement and unemployment tax of 6½%.

(b) Inspection charge representing time of inspector for one hour ($1.35).

(c) Charge for water furnished at $1.00 per tank.

(d) 7% for use of facilities and local supervision.

EXHIBIT "R"—Continued

DIESEL LOCOMOTIVES:

Rental and charge for diesel locomotives to be on same basis as outlined for steam locomotives.

PASSENGER CARS:

Record of interchange of passenger cars between CRP and CNJ will be obtained by the Car Accountant from conductor's wheel reports and settlement made as per A. A. R. rules.

Reports, etc., received from and made to other foreign lines covering use of passenger cars on lines of CRP will be, continued in effect, the only charge being settlement will be made by the CRP with foreign lines.

Average material and labor costs by type of car plus railroad retirement and unemployment tax and vacation expense to be used for passenger car cleaning.

CABOOSE CARS:

A record of caboose cars of CRP ownership used on lines of CNJ and of CNJ caboose cars used on CRP will be obtained by the Car Accountant from wheel reports and cabooses will be considered interchanged on basis of data furnished on Form 17001.

A charge of $1.75 per car day will be made by the owning road against the user on a per diem basis.

WORK AND WRECK TRAINS, BUSINESS CARS AND MISCELLANIOUS EQUIPMENT:

Equipment of this nature will be exchanged between the two companies at rental rates covered by Joint Circular Equipment Rental Rates.

CLASSIFIED REPAIRS TO EQUIPMENT OF ONE COMPANY AT SHOPS OF THE OTHER:

From time to time units of equipment owned or leased by the CRP will be repaired in shops or facil-

EXHIBIT "R"—Continued

ities of the CNJ, and in certain instances CNJ equipment will be repaired by the CRP. In either case, it will be necessary to record the actual expense by unit of equipment number of labor and material, including appropriate shop and store expense, 9½% for railroad retirement and unemployment taxes and vacation expense, plus 13% for use of facilities and local supervision.

Routine freight and passenger car repairs not included in programmed classified repairs will be handled under the Code of Rules governing the condition of and repairs to freight and passenger cars, adopted by the A. A. R.

Car repair billing cards must be prepared for work performed on cars bearing initials "CNJ" at each and every point on CNJ and CRP. Car repair billing cards will also be prepared for work performed on cars bearing initials "CRP" at all points on the CNJ.

CREW WAGES:

Crew wages of CRP crews chargeable to the CNJ and vice versa, will be obtained from engine and train crew time cards by the Auditor Disbursements and on joint runs will be divided between the roads on the basis of miles indicated on time cards. In the event a CRP crew is used the entire tour of duty in CNJ service, the full amount of wages to be billed the user road, and the same procedure used when conditions are reversed. Wage penalties shall be charged against the carrier where the violation occurs whenever that is possible, and in other cases shall be divided on a mileage basis.

JUNCTION TERRITORY:

The tower at Phillipsburg, N. J., performs certain functions for CRP in the handling of switches and

EXHIBIT "R"—Continued

signals in Pennsylvania. CNJ will bill CRP on basis of relative use for the expense of ownership, operation and maintenance of this facility.

The agent and station force at Easton, Pa. performs the station work at Phillipsburg, N. J. for CNJ. The expense of this operation will be billed to CNJ by CRP.

DEPRECIATION:

In addition to depreciation on equipment owned by the CRP, depreciation charges on the equipment leased by the CRP specifically described on page 1, shall be included in operating expenses and the CRP shall maintain the same service lines, salvage value, etc., as provided for owned equipment.

Settlement between the two companies relative to the depreciation shall be made annually as provided for in the lease agreement.

INSURANCE:

Insurance policies covering property located on the lines in Pennsylvania will be amended to include the CRP as a party to the contracts as its interests may appear and a division of the premium made between the CNJ and CRP based upon the properties covered on and subsequent to August 4/1946. CRP shall take over its proper proportion of insurance reserve charges and build its own insurance reserve.

Additions and betterments which have been approved and A. F. F. submitted applicable to property leased by the CRP, the construction or application of which has not been started before August 5/1946, will be canceled as a CNJ project and resubmitted for approval as a CRP project. On projects under way on August 5/1946 which affect the property leased by the CRP, charges incurred subsequent to August 4/1946 will be billed to the CNJ.

EXHIBIT "R"—Continued

INSTRUCTIONS COVERING PREPARATION OF CAR SERVICE REPORTS

Report No.	*Title*	*Prepared by*	*Remarks*
CS-60	Revenue freight cars undergoing or awaiting repairs	G. H. Massy	Separate report must be made for CRP and CNJ
CS-10	Statement of foreign cars on line by railroads	H. H. Hallarin	Separate report. See letter of 8/22/46 filed as part of this circular
CS-10-B	Statement of open top cars on foreign lines	H. H. Hallarin	System report to be prepared covering both CNJ and CRP and to be headed Jersey Central Lines "CRR of NJ—CRP"
CS-11	Revenue freight car location summary	H. H. Hallarin	Separate report to be made for CNJ and CRP
CS-57	Mileage made by private line freight cars	H. H. Hallarin	Separate report to be made for CNJ and CRP
CS-11-1	Monthly report of freight cars owned and leased, installed and retired with aggregate capacity	G. H. Massy	Separate report should be mare for CNJ and CRP
CS-59	Net tons railroad fuel stock on hand	H. Morris	Separate report to be made for CNJ and CRP
CS-44	Weekly report of average daily revenue, freight car surpluses and shortages	N. P. Willis	System report to be prepared covering both CNJ and CRP
CS-54	Weekly and monthly report of cars of revenue freight loaded and received from connections	H. H. Hallarin	System report for both CNJ & CRP to be made to the AAR. Daily report now made in Transportation Dept., which is basis for this report to be changed to show CRP instead of L & S Division and line to be added to show total CRR of NJ (Central Division-Southern Division-NY & LB). Also, lines to be added to show CNJ received from CRP and CRP received

EXHIBIT "R"—Continued

Report No	*Title*	*Prepared by*	*Remarks*
			from CNJ. System total to show total loaded and received but will not include the interchange between system lines.
CS-13	Summary of revenue cars containing company material	N. P. Willis	System report covering both CNJ and CRP to be prepared. A separate record of company coal figures for the CNJ and CRP to be maintained in office of Sup't Fuel & Loco Performance
CS-55	Passenger train equipment owned or leased	G. H. Massy	Separate report should be mare for CNJ and CRP
CS-56-1	Summary of monthly locomotive equipment	G. H. Massy	Separate report should be mare for CNJ and CRP
CS-56	Summary of monthly locomotive condition report	G. H. Massy	Separate report should be mare for CNJ and CRP

OS Reports to I. C. C.:

OS Series report to I. C. C. to be made on individual road basis.

MCS—Monthly Report of Freight Commodity, statistics to the I. C. C. to be separated to show the CNJ and CRP separately.

Report Form RB-3 to District Manager, A. A. R., New York City, to be made for the individual lines.

Wm. Wyer,
President.

EXHIBIT "R"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

FREIGHT TRAFFIC DEPARTMENT

143 Liberty Street
New York 6, N. Y.

August 5, 1946

FREIGHT CIRCULAR No. 1

Adoption by Central Railroad Company of Pennsylvania of The Central Railroad Company of New Jersey Stations in the State of Pennsylvania

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TO CONNECTING LINES AND TARIFF PUBLISHING AGENTS:

Your attention is directed to the attached copy of Central Railroad of Pennsylvania Adoption Notice I. C. C. No. A-1, effective August 5, 1946, by which this Company adopts stations of The Central Railroad Company of New Jersey in Pennsylvania, Easton, Pa. and West, to and including Scranton, Pa., including branches, complete list of stations being shown in the Adoption Notice.

These stations are at present shown in Agent Leland's Open and Prepay Station List No. 61 as taking Index No. 361 (Easton, Pa.) to Index No. 601 (Scranton, Pa.), inclusive, and which Index Numbers are to be continued for account Central Railroad Company of Pennsylvania.

Agent Leland has amended his Open and Prepay Station List to provide for this change. Lehigh and

EXHIBIT "R"—Continued

Susquehanna Division, as now shown, should be changed to "Main Line." Agent Leland has been instructed to provide for this change.

Connecting Lines and Tariff Publishing Agents should amend their tariffs promptly to show that these stations are now located on Central Railroad Company of Pennsylvania and at the same time add that line as a participating carrier thereto, as provided for under Rule 9(j) of I.C.C. Tariff Circular No. 20.

Routing should also be corrected showing State Line Junction, N. J.-Pa. as the junction point between The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania.

Division Sheets are being issued showing the subdivision between CRR of NJ and CRR of Pa. of the proportions now shown in Percentage and Division Sheets as accruing to The Central Railroad Company of New Jersey, so that proper settlements can be made direct with The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania. Copies of these Division and Percentage Sheets will be furnished you just as soon as ready for distribution, for transmission to your Auditing Department.

Connecting Lines should promptly issue concurrences in favor of Central Railroad Company of Pennsylvania to cover both Interstate and Pennsylvania Intrastate traffic. Tariff Publishing Agents should furnish blank Power of Attorney forms for execution by Central Railroad Company of Pennsylvania to cover Interstate, Pennsylvania Intrastate and Canadian traffic, furnishing one additional copy of the triplicate for our use.

J. F. HOURIGAN,
Asst. Freight Traffic Manager.
New York, N. Y.:

EXHIBIT "R"—Continued

E KEIL,
General Freight Agent,
New York, N. Y.;

T. H. IRWIN,
Asst. Freight Traffic Manager,
New York, N. Y.;

J. S. WATSON,
General Coal Freight Agent,
New York, N. Y.;

B. J. McSWEENEY,
General Freight Agent,
New York, N. Y.;

C. N. BISSELL,
Asst. General Freight Agent,
143 Liberty Street,
New York 6, N. Y.

Commonwealth's Exhibit No. 8
Exhibit "S"

EXHIBIT "S"

Appointment Notices of Defendant—Jersey City, N. J.

(Three Omitted by Agreement of Counsel)

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Office of

VICE PRESIDENT AND GENERAL MANAGER

Jersey City 2, N. J.
July 1, 1951.

Mr. W. A. Nickel is appointed Assistant General Manager.

The position of Assistant to Vice President and General Manager, formerly held by Mr. Nickel, is abolished.

Effective this date.

A. C. TOSH,
Vice President and General Manager.

Approved:

E. T. MOORE,
President.

EXHIBIT "S"—Continued

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Office of

VICE PRESIDENT AND GENERAL MANAGER

Jersey City 2, N. J.
July 1, 1951.

Mr. W. A. Nickel is appointed Assistant General Manager.

The position of Assistant to Vice President and General Manager, formerly held by Mr. Nickel, is abolished.

Effective this date.

A. C. TOSH,
Vice President and General Manager.

Approved:

E. T. MOORE,
President.

EXHIBIT "S"—Continued

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Office of
ENGINEER MAINTENANCE OF WAY

Jersey City 2, N. J.
February 1, 1951.

Mr. E. T. Anderson is appointed Asst. Engineer, with headquarters at Jersey City, N. J.

Mr. Martin Golden is appointed Asst. Supervisor of Track, Southern Division, succeeding Mr. E. T. Anderson.

Effective this date.

C. H. VOGT,
Engineer Maintenance of Way.

Approved:
S. L. MAPES,
Chief Engineer.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Office of
ENGINEER MAINTENANCE OF WAY

Jersey City 2, N. J.
February 1, 1951.

Mr. E. T. Anderson is appointed Asst. Engineer, with headquarters at Jersey City, N. J.

Effective this date.

C. H. VOGT,
Engineer Maintenance of Way.

Approved:
S. L. MAPES,
Chief Engineer.

EXHIBIT "S"—Continued

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Office of
CHIEF ENGINEER

Jersey City 2, N. J.
February 1, 1951.

Mr. Carl H. Vogt is appointed Engineer Maintenance of Way, succeeding Mr. T. E. MacMannis, who is leaving our service to accept position as Engineer Maintenance of Way with the Reading Company.

Effective this date.

S. L. MAPES,
Chief Engineer.

Approved:
E. T. MOORE,
President.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Office of
CHIEF ENGINEER

Jersey City 2, N. J.
February 1, 1951.

Mr. Carl H. Vogt is appointed Engineer Maintenance of Way, succeeding Mr. T. E. MacMannis, who is leaving our service to accept position as Engineer Maintenance of Way with the Reading Company.

Effective this date.

S. L. MAPES,
Chief Engineer.

Approved:
E. T. MOORE,
President.

EXHIBIT "S"—Continued

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Office of
ENGINEER STRUCTURES

Jersey City 2, N. J.
August 1, 1951.

Mr. E. J. Robrecht is appointed Engineer Maintenance of Structures, succeeding Mr. J. R. Prizer, retired.

Mr. P. R. Ciccolilli is appointed Supervisor of Bridges and Buiidings.

Position of Assistant Engineer Maintenance of Structures, formerly held by Mr. Robrecht, is abolished.

Effective this date.

B. J. MISETTI,
Engineer Structures.

Approved:
S. L. MAPES,
Chief Engineer.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Office of
ENGINEER STRUCTURES

Jersey City 2, N. J.
August 1, 1951.

Mr. E. J. Robrecht is appointed Engineer Maintenance of Structures, succeeding Mr. J. R. Prizer, retired.

EXHIBIT "S"—Continued

Mr. P. R. Ciccolilli is appointed Supervisor of Bridges and Buildings.

Position of Assistant Engineer Maintenance of Structures, formerly held by Mr. Robrecht, is abolished.

Effective this date.

B. J. MISETTI,
Engineer Structures.

Approved:

S. L. MAPES,
Chief Engineer.

EXHIBIT "T"

Circulars of Defendant—Jersey City, N. J.

(One omitted by Agreement of Counsel)

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

ACCOUNTING DEPARTMENT

Circular No. 2

Jersey City 2, N. J.
August 5/1946

ACCOUNTING INSTRUCTIONS

Effective 12:01 A.M., E.S.T., August 5/1946, Central Railroad Company of Pennsylvania will operate under lease the lines of railroad in Pennsylvania formerly operated by The Central Railroad Company of New Jersey, Walter P. Gardner, Trustee.

The property dividing line between Central Railroad Company of Pennsylvania and The Central Railroad Company of New Jersey will be the Pennsylvania-New Jersey State Line located 0.2 miles west of Phillipsburg Station, which is designated as State Line Junction.

The Central Railroad Company of New Jersey is hereinafter referred to as CNJ and Central Railroad Company of Pennsylvania as CRP.

Operating Expenses:

Expensse applicable to CRP will be accounted for on a separate register and journal maintained in the Disbursements Department, and a series of voucher numbers allotted monthly for CRP vouchers.

Care must be exercised in apportioning expenses between CRP and CNJ on all bills from companies and individuals for services furnished, when period of such

EXHIBIT "T"—Continued

service overlaps August 5/1946. For example,—a bill from Scranton Water Company,—covering water furnished during period July 20th to August 20th, and rendered vs. CNJ, should be divided indicating 16/31 chargeable to CNJ and 15/31 to CRP, and separate voucher checks prepared accordingly.

Separate time rolls are being furnished to locations on the L&S Division where semi-monthly time sheets are maintained, with instructions to the effect that as soon after August 4th as possible the time roll for August 1st to 4th, incl., is to be completed and forwarded to the Accounting Department in the regular manner. The balance of the first period of August and subsequent periods to be reported in the usual manner on CRP time rolls.

Two distributions covering pay rolls, material and work service for the month of August must be made for all L&S Division points, one August 1st to 4th, inclusive, for CNJ, and August 5th to 31st for CRP.

Two Power Plant distributions for L&S Division points will be made for the month of August 1946. The period August 1st to 4th, inclusive, distributed to CNJ expense accounts and for the balance of the month to CRP expense accounts.

Separate reports from the field covering operation, maintenance and statistical information for the month of August will be required in connection with all joint facilities located on L&S Division, divided as previously outlined between CNJ and CRP.

General Office pay rolls, stationery and supplies, personal expenses and office expense of officers and such of their staff whose activities embrace both CNJ and CRP lines, are to be divided between the two companies on the following basis:

CRP-Acctg.Dep't
Sheet #2

EXHIBIT "T"—Continued

Until further notice, twenty-two percent (22%) of such general expense will be chargeable to CRP for all offices other than Freight and Passenger Traffic, in which cases the percentage chargeable to CRP will be thirty-two percent (32%).

CNJ Offices Having Activities Common to Both CNJ and CRP:

Chief Executive, including Director of Information and News Editor of Coupler
Legal Department, including General Claims Office and Freight Claim Department
Secretary and Treasurer
Freight Traffic, including off-line offices
Passenger Traffic
Medical Director
Purchasing Department, including General Storekeeper & Stationery Storekeeper (for purpcse of calculating store expense)
Chief Engineer
General Manager, including Sup't Motive Power and Equipment, Superintendent Transportation, Engineer Maintenance of Way, Signal Engineer, Electrical Engineer, Superintendent Locomotive & Fuel Performance, Superintendent Police, Superintendent Mail and Express
Property Manager, including Real Estate Agent, Valuation Engineer, Tax Attorney and Tax Assistant
Accounting Department, including Car Accountant and Movement Bureau

Note:

There will be change in the past practice of Engineering and other departments charging wages and other expenses to specific projects and companies.

All materials and supplies will be ordered and accounted for separately for each Company. Material

EXHIBIT "T"—Continued

register and record of material purchased will be maintained for each Company.

Material bills, requisitions, sales order, etc., must be approved by the Purchasing Agent, or other officials of CRP in the same manner as is now in effect for CNJ.

The physical inventory of materials and supplies taken at the close of the last business day before August 5, 1946, on the lines in Pennsylvania, will establish the initial balance of material and supplies on hand for CRP on August 5/1946.

Record of locomotive mileage by classes of locomotives separately for CRP and CNJ will be maintained by the Car Accountant.

Miles made by CRP locomotives by classes of locomotives on lines of CNJ, and vice versa, will be furnished the Auditor Disbursements monthly for billing purposes.

F. E. Gregg.
Comptroller.

Approved:
Wm. Wyer,
President.

JERSEY CENTRAL LINES

Accounting instructions to Motive Power and Rolling Equipment Department Officers and Employees covering the reporting of information in connection with repairs and other attention given equipment to assure proper charges and credits being made to The Central Railroad Company of New Jersey
and
Central Railroad Company of Pennsylvania
Effective 12:01 A M., August 5, 1946

Circular No. 4

Jersey City, N. J., August 5, 1946

The Central Railroad Company of New Jersey is hereinafter referred to as CNJ and Central Railroad Company of Pennsylvania as CRP.

EXHIBIT "T"—Continued

GENERAL

It is important that time cards, material tickets, coal reports, lubrication reports and all other forms used for accounting purposes, indicate either "CNJ" or "CRP", as well as the individual unit number, *except as otherwise provided herein*, on the basis of locomotives, passenger cars, freight cars, and company service equipment leased to the CRP.

From time to time, some locomotives and passenger cars leased to the CRP may be used on the CNJ and vice versa, but the charges should be made on the basis of the lists already furnished; in the preparation of A.A.R. Billing Repair Cards for freight cars, forms should indicate the reporting marks actually stencilled on the cars.

In addition to the above general instructions, the following practices must be followed with respect to the various classes of equipment:

LOCOMOTIVES

Repairs:

At Elizabethport Locomotive Shop, the present practice of indicating the individual locomotive numbers on time cards and material tickets will be continued and in addition, the letters "CNJ" or "CRP" must be indicated. This will permit the Accounting Department to make the charges direct to each company without the submission of Forms 702 "Locomotives Repaired for Other Companies".

At all other Locomotive Shops, Engine Houses and outside locomotive dispatchment points where drop pit work or running repairs are made to CNJ locomotives on the CRP and CRP locomotives on the CNJ, extreme care must be exercised in reporting the initials "CNJ" and "CRP" on time cards, material tickets and other reports. This will permit the Accounting Department

EXHIBIT "T"—Continued

to make the charges direct to each company without the submission of Forms 702 "Locomotives Repaired for Other Companies".

Supervisors in charge at all points must review all time cards, material tickets and other reports to assure that all information indicated is correctly stated.

Engine House Expenses (Accts. 388 and 400):

The monthly reports submitted by Master Mechanics Young and Whitener and Works Manager Shepherd to the Accounting Department covering locomotive dispatchments must show CNJ and CRP dispatchments separately in addition to Reading, B. & O. and other foreign locomotive dispatchments. Dispatchments prior to 12:01 A.M., (EST), August 5, 1946, for all locomotives included in CNJ ownership should be reported as CNJ and after that time should be reported on the basis of locomotive lists furnished.

Lubricants:

All lubricants furnished to CRP locomotives on the CNJ and CNJ locomotives on the CRP must be reported on Forms 16067 or Form 16067—A "Daily Record of Oils, Greases, Waste and Packing issued to Locomotives". It will not be necessary that a separate form be issued but the locomotive initial must be shown in each instance and included on the same form covering lubricants furnished Reading, B. & O. and other foreign locomotives.

Other Supplies:

Present practice of submitting material tickets for shovels, fire hooks and other supplies furnished locomotives will be continued and the initials "CNJ" or "CRP" must be shown in addition to the locomotive number.

EXHIBIT "T"—Continued

Locomotive Fuel:

Fuel supplied CRP locomotives on the CNJ and CNJ locomotives on the CRP must be reported on individual coal tickets, Form 4337, the same as is now being done when coal is furnished to foreign locomotives. Coal furnished CNJ locomotives on the CNJ and CRP locomotives on the CRP should be reported on Form 4104. In either case, the reporting marks "CNJ" or "CRP" must be shown in addition to the locomotive number. These reports should be forwarded to Mr. Morris, Supervisor of Fuel and Locomotive Performance, the same as in the past.

PASSENGER CARS

Repairs:

At Elizabethport Passenger Car Shop, time cards and material tickets for *heavy repairs* must indicate the reporting marks "CNJ" or "CRP" in addition to the car number, to permit proper charges being made against the respective companies by the Accounting Department. A.A.R. Billing Repair Cards must be prepared for all *light* and *running repairs* to CRP passenger cars on the CNJ. Also, A.A.R. Billing Repair Cards must be submitted for all light and running repairs to CNJ passenger cars while on the CRP.

At Jersey City Passenger Yard and outside points where repairs to passenger cars are made, the present practice of submitting time cards and material tickets will be continued and it is not necessary that the individual unit numbers be shown thereon. Billing Repair Cards must be submitted covering repairs, flushing batteries and periodic repacking of journal boxes on cars bearing initials "CRP" at each and every point on the CNJ. At locations on the CRP, Billing Repair Cards will also be required for repairs to CNJ cars.

EXHIBIT "T"—Continued

Charging Batteries:

It will be necessary that Billing Repairs Cards be prepared covering the charging of batteries on CRP equipment at Jersey City Passenger Yard. The present practice of forwarding these Billing Repairs Cards to the Electrical Engineer for calculation of electric energy will be continued and when Repair Cards are submitted to the Sup't M.P. & R.E. office, bill will be rendered again—at the CRP on the basis of A.A.R. Rules.

Car Cleaning:

Sup't M.P. & R.E. will render CNJ bill against CRP for their proportion of cost of cleaning and icing passenger cars at Jersey City Passenger Yard in Jersey City-Harrisburg, and Jersey City-Mauch Chunk trains, and CRP bill against Reading Company for their proportion of cleaning and icing passenger cars in Scranton-Philadelphia trains on the basis of report of cars interchanged which is furnished by Car Accountant H. H. Hallarin. Until such time as car cleaning rates are revised to include recent wage increases, present rates will be used. Sup't M.P. & R.E. will also render CRP bill versus CNJ for cars cleaned at Mauch Chunk on through trains from Jersey City. The rate per car cleaning should be established on the basis now being prepared by the Mechanical Department.

FREIGHT AND WORK EQUIPMENT CARS

Repairs:

On account of a large number of units formerly included in CNJ ownership now leased to the CRP, the list of permanent SRP (Special Repair Program) code numbers in use since June 1945 for the purpose of designating class 1 and class 2 repairs at Elizabethport and Ashley Car Shops will be revised by Sup't M.P.

EXHIBIT "T"—Continued

& R.E. to provide separate code numbers for CNJ and CRP equipment and in order to avoid any confusion between the designations "SRP" and "CRP", the code numbers will be prefixed by the letters "HR" representing "heavy repairs".

At Elizabethport Freight Car Shop all time cards and material tickets covering class 1 and class 2 repairs to both CNJ and CRP cars must indicate the appropriate "HR" (heavy repairs) code number. For class 3 and class 4 repairs, formerly indicated by "SRP-70", the designation will be changed to "LR-70", representing "light repairs". A.A.R. Billing Repair Cards must be submitted for all work on class 3 and class 4 repairs at Elizabethport Freight Car Shop, for all CNJ or CRP cars as stencilled. The preparation of A.A.R. Billing Repair Cards for CNJ will be continued until such time as the reporting marks are changed on all freight and work equipment cars.

At Ashley Car Shop the same procedure as indicated above for Elizabethport Freight Car Shop must be followed. The class 3 and class 4 repairs, however, refer only to light repair program cars formerly designated as "SRP-70" and does not refer to running repair work which is set up in the budget under "Outlying Car Points".

At car inspection points and repair tracks on the CNJ, the present practice of submitting time cards and material tickets will be continued and it is not necessary that the individual initials and car numbers be shown. A.A.R. Billing Repair Cards must be submitted, however, for repairs, air brake cleaning, periodic repacking of journal boxes and reweighing of *all cars marked either CRP or CNJ*. This practice will be continued until such time as the reporting marks are changed on all freight and work equipment cars.

At car inspection points and repair tracks on the CRP, including the running repair force at Ashley Car

EXHIBIT "T"—Continued

Shop, the present practice of submitting time cards and material tickets will be continued and it is not necessary that the individual initials and car numbers be shown. A.A.R. Billing Repair Cards must be submitted, however, for repairs, air brake cleaning, periodic repacking of journal boxes and reweighing of all cars *marked* "CNJ", whether or not they are included in the list of equipment leased to the CRP. If the reporting marks are changed to "CRP" at the same time that repairs are made, there will, of course, be no necessity for submitting Billing Repair Card.

The Foreman Car Inspector at Phillipsburg will submit a monthly statement to the Accounting Department of the time of his forces while inspecting cars on the CRP. This statement should indicate the employees name, work number, number of hours and his hourly wage rate.

BILLING REPAIR CARDS

WHEEL AND AXLE CARDS

DEFECTIVE CARDS

ADJUSTMENT OF LADING CARDS

Supply of this form is being printed with the name CENTRAL RAILROAD COMPANY OF PENNSYLVANIA and supply of same will be forwarded to each location on the CRP as soon as received. Until they are received, the forms now on hand must be used. Do not delay the submission of Billing Repair Cards until the new forms are received but see that they are forwarded currently. Supply of rubber stamps reading CENTRAL RAILROAD COMPANY OF PENNSYLVANIA has been ordered and will be forwarded to all locations on the CRP for the purpose of stamping the proper name of the company on all of these forms. Billing Repair Cards forwarded prior to receipt of the

EXHIBIT "T"—Continued

stamps will have the name changed in the Car Repair Billing Bureau at Jersey City.

The A.A.R. Rules of Interchange will be observed between the CNJ and the CRP and Defect Cards must be obtained for delivering line defects the same as from any other foreign line. There will be no change in the operation of through trains and, therefore, no inspection will be made at the point of interchange. In view of this, the CNJ will accept inspection record of CRP on eastbound trains and the CRP will accept CNJ inspection record on westbound trains.

H. P. MEAD
Auditor Disbursements

G. H. MASSY
Sup't M.P. & R.E.

Approved:

E. T. MOORE
General Manager

F. E. GREGG
Comptroller

JERSEY CENTRAL LINES

Accounting Instructions to Operating Department Officers and Employees in Connection with Central Railroad Company of Pennsylvania. Effective 12:01 A. M., E.S.T., August 5, 1946

Circular No. 5

Jersey City, N. J., August 5, 1946

The Central Railroad Company of New Jersey is hereinafter referred to as C.N.J. and Central Railroad Company of Pennsylvania as C.R.P.

EXHIBIT "T"—Continued

The following instructions cover the preparation of time cards:

Engine and Train Service Employees

(1) When submitting daily time card, conductor or trainmaster must show home terminal in space marked "Division". This will be the only means by which Accounting Department can determine whether employee is to be carried on C.N.J. or C.R.P. payroll.

(2) When a C.N.J. employee "fills in" or works with a C.R.P. crew, the C.N.J. employee must submit a separate C.N.J. time card indicating thereon that he is working with a C.R.P. crew or vice versa for a C.R.P. employee with a C.N.J. crew.

(3) Supervisors authorized to sign enginemen or trainmen's time cards must see that these instructions are complied with.

Other Employees

If at any time an employee of C.N.J. whose time is reported daily should work at any point on the C.R.P., this employee should report his time on a C.N.J. time card and indicate clearly thereon location of work. This same procedure should be followed for a C.R.P. employee working on C.N.J.

H. P. MEAD
Auditor Disbursements

F. J. CASSIDY
Superintendent

C. W. SCHWARZ
Superintendent

Approved:

E. T. MOORE
General Manager

F. E. GREGG
Comptroller

Commonwealth's Exhibit No. 8
Exhibits "U" and "V"

EXHIBIT "U"

Letterhead of Defendant at Detroit Location

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Walter P. Gardner, *Trustee*

THE CENTRAL RAILROAD COMPANY OF PENNSYLVANIA

Freight Traffic Department Office, *General Agent*

623 Lafayette Bldg.

Cadillac Square

Detroit 26, Mich.

EXHIBIT "V"

Calling Cards of Defendant's Officials and Agents at Various Locations (Omitted by Agreement)

EXHIBIT "W"

Affidavit Re Name of Defendant on Office Doors at Various Locations

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AFFIDAVIT OF WILLIAM D. WAKEMAN

I am presently employed by The Central Railroad Company of New Jersey as General Freight Agent in the Traffic Department with headquarters at 143 Liberty Street, New York.

From August 5, 1946 to April 1, 1950 I was the General Agent of the Central Railroad of Pennsylvania and The Central Railroad Company of New Jersey at Albany, New York with offices at 11 The Plaza. On the entrance door to my office there was painted the following:

Jersey Central Lines
Central Railroad of Pennsylvania
Central Railroad Company of New Jersey

Effective April 1, 1950 I was appointed General Western Freight Agent for the Central Railroad of Pennsylvania and The Central Railroad Company of New Jersey with headquarters in the Banker's Building, 105 West Adams Street, Chicago, Illinois, which position I held until October 20, 1952. On the entrance door to my office in the Banker's Building there was painted the following:

Jersey Central Lines
Central Railroad of Pennsylvania
Central Railroad Company of New Jersey

/s/ WILLIAM D. WAKEMAN
William D. Wakeman

Sworn and subscribed to before me this 4th day of October, 1956

/s/ MARY A. McNAMARA
Notary Public of the State of New York

Mary A. McNamara
Notary Public State of New York
No. 03-2512400
Qualified in Bronx County
Certificate filed with N. Y. County Clerk
Term Expires March 30, 1957.

(SEAL)

EXHIBIT "X"

Car Service and Per Diem Agreement

(Counsel for both parties agree that this Exhibit which is lengthy, need not be printed; that the Agreement fixes a Per Diem Rate of $1.75 for freight cars while on the railroad lines of others; and that either party may quote verbatim from the agreement in their briefs.)

EXHIBIT "Y-1"

Number, Type, Cost and Net Book Value of Defendant's Freight Cars Subject to Per Diem Rate

Number	*Type*	*Cost*	*Net Book Value Dec. 31, 1951*
1001-2000	Gondola	$3,269,253.23	$2,484,910.00
101-200	Flat	360,000.74	299,426.19
10001-10500	Hopper	1,304,597.47	1,057,460.40
22001-22176	Box	720,937.61	654,804.39
22177-22480	Box	1,270,568.33	1,154,509.06
22501-22972	Box	1,966,885.57	1,792,367.95
22973-23250	Box	1,168,463.75	1,064,927.68
500-625	Cement	719,759.20	655,923.13
626-750	Cement	889,866.92	857,749.57
1-8	Ore	63,193.44	58,581.26
			$10,080,599.63

EXHIBIT "Y-2"

Car Days of Defendant's Freight Cars on Its Own Lines in Pennsylvania

1. Revenue Freight Cars Owned ..		3,074	
2. Maximum Number of Car Days 3074 x 365			1,122,010
3. Car Days on Foreign Roads			
(a) Not operating in Penna. ..		605,678	
(b) Operating in and out of Penna.		386,532	
(c) Operating only in Penna. ..		25,321	
			1,017,531
4. Car Days on Home Road ..... (Line 2-Line 3)			104,479

EXHIBIT "Y-3"

Car Days of Defendant's Freight Cars on Railroad Lines of Others Wholly Within Penna.

Road	*Car Days*
Bellefont Central R.R.	9
Bessemer and Lake Erie R.R.	1,510
Cambria and Indiana R.R.	335
Conemaugh and Black Lick R.R.	1,364
Cornwall R.R.	42
Donora Southern R.R.	331
East Erie Commercial R.R.	94
Etna and Montrose R.R.	79
Ironton R.R.	1,858
Johnstown and Stony Creek R.R.	119
Monongahela Rwy.	1,545
Monongahela Connecting Rwy.	1,312
Montour R.R.	265
McKeesport Connecting R.R.	641
Northampton & Bath R.R.	127
Philadelphia, Bethlehem & New England R.R.	3,497
Pittsburgh & Ohio Valley R.R.	262
Pittsburgh & Shawmut R.R.	238
Pittsburgh, Chartier & Younghiogheny Ry.	510
Steelton & Highspire R.R.	878
Union Railroad	6,663
Upper Merion & Plymouth Railroad	3,549
Unity Rys.	46
Western Allegheny R.R.	2
Lake Erie Franklin & Clarion R.R.	33
New Haven & Dunbar R.R.	12
	25,321

EXHIBIT "Y-4"

Car Days of Defendant's Freight Cars on Railroad Lines of Others Extending Within and Without Penna.

Road	Total Road Miles	Road Miles in Pa.	Per Cent Pa.	Total Car Days	Car Days to Pa. (Col. 3X Col. 4)
	(1)	(2)	(3)	(4)	(5)
Reading Company	1321.26	1244.77	94.21	52790	49733
Baltimore & Ohio	6186.59	1153.76	18.65	56590	10554
Delaware & Hudson	793.37	88.90	11.21	6709	752
Erie	2354.90	620.77	26.36	20443	5389
D.L. & W.	964.16	250.12	25.94	15509	4023
Pennsylvania	10119.53	3993.32	39.46	114657	45243
New York Central	10724.53	788.95	7.36	91899	6764
Lehigh & New England	184.19	120.87	65.62	6708	4402
Lehigh Valley	1219.51	503.76	41.31	14927	6166
Western Maryland	835.50	240.98	28.84	4846	1398
Pittsburgh & West Virginia	131.79	105.41	79.98	1097	877
Maryland & Pennsylvania	77.20	33.40	43.26	357	154
				386532	135455

Commonwealth's Exhibit No. 8
Exhibit "Y-4"

EXHIBIT "Y-5"

Car Days of Defendant's Freight Cars on Railroad Lines of Others Wholly Without Penna.

Name of Company	*Car Days*
Aberdeen & Rockfish R.R.	99
Akron & Barberton Belt R.R.	372
Akron, Canton & Youngstown Ry.	409
Alabama, Tenessee & Northern R.R.	166
Algoma Central & Hudson Bay Ry.	586
Alton & Southern R.R.	611
Ann Arbor R.R. (Rec'rs)	556
Arkansas & Louisiana Missouri Ry.	90
Atchison, Topeka & Santa Fe Ry.	20306
Atlantic Coast Line R.R.	15334
Atlantic & East Carolina R.R.	216
Atlanta & St. Andrews Bay Ry.	100
Alameda Belt Line	98
Atlantic & Danville Ry.	289
Anna-Jonesboro R.R.	16
Baltimore & Ohio Chicago Terminal	3464
Bamberger R.R.	40
Bangor & Aroostook R.R.	458
Belt Railway Co. of Chicago	3708
Berlin Mills Co.	162
Birmingham Southern R.R. Co.	634
Boston & Maine R.R.	9105
Buffalo Creek R.R.	454
Butte Anaconda & Pacific R.R.	52
British Columbia Elec. Ry.	33
Bonhomie, Hattiesburg Southern R.R.	37
Benwovel & Wheeling Com. Ry. Co.	73
Canadian National Railways	19507
Central R.R. Co. of New Jersey	57689

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Canadian Pacific Railway	11648
Canton & Carthage R.R.	33
Canton Railroad	690
Cedar Rapids & Iowa City Railway	148
Central Calif. Traction Co.	22
Central of Georgia Railway	4478
Central Vermont Railway, Inc.	951
Charleston & Western Carolina Ry.	604
Chesapeake & Ohio Railway C. & O. Dist.	8866
Chesapeake & Ohio Ry. Pere Marq. Dist.	5765
Chesapeake Western Railway	44
Chicago & Eastern Illinois R.R.	2080
Chicago & Illinois Midland Railway	655
Chicago & Illinois Western R.R.	170
Chicago & Northwestern Ry.	19668
Chicago, Burlington & Quincy R.R.	14248
Chicago, Great Western R.R.	3535
Chicago Heights Terminal Transfer R.R.	262
Chicago, Indianapolis & Louisville Ry.	1961
Chicago, Milwaukee, St. P. & Pac. R.R.	21672
Chicago Short Line Ry.	189
Chicago, Rock Island & Pacific R.R.	14189
Chicago, West Pullman & Southern R.R.	372
Clinchfield Railroad	847
Colorado & Southern Railway	599
Colorado & Wyoming Ry.	295
Columbia, Newberry & Laurens R.R.	49
Columbus & Greenville Ry.	271
Copper Range R.R.	84
Cumberland & Pennsylvania R.R.	34
Chicago River & Indiana R.R. Co.	1541
Chicago, So. Short & So. Bend R.R.	110
Cuyahoga Valley Ry. Co.	539
Chicago, Aurora & Elgin R. R. (Rec'rs)	15
Davenport, Rock Island & Northwestern Ry.	47
Delray Connecting R.R.	244

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Denver & Rio Grande Western R.R.	2218
Des Moines & Central Iowa R.R.	80
Des Moines Union Railway	245
Detroit & Mackinac Railway	394
Detroit & Toledo Shore Line R.R.	730
Detroit Terminal R.R.	1120
Detroit, Toledo & Ironton R.R.	1969
Duluth, Missabe & Iron Range R.R.	642
Duluth South Shore & Atlantic Ry.	697
Duluth, Winnipeg & Pacific Railway	201
Durham & Southern Railway	71
Duluth & Northeastern R.R.	134
Denver & Intermountain R.R.	14
East St. Louis Junction R.R.	79
Elgin, Joliet & Eastern R.R.	10579
Essex Terminal Railway	302
Escanaba & Lake Superior R.R.	53
Ferrocarril, Kans. City, Mexico y Oriente	92
Fairport, Painesville & Eastern Railroad	155
Florida East Coast Railway	1689
Ft. Dodge, Des Moines & So. R. R. (Trustee)	411
Forth Worth & Denver Railway	1269
Forth Worth Belt R.R.	27
Fernwood, Columbia & Gulf R.R.	74
Gainesville Midland R.R.	94
Galveston, Houston & Henderson R.R.	37
Georgia Railroad	760
Georgia & Florida Railway (Rec'rs)	592
Grand Trunk Railway System (W.L.)	6369
Graysonia, Nashville & Ashdown R.R.	34
Great Northern Railway	9653
Green Bay & Western Railroad	326

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Gulf, Mobile & Ohio R.R.	7562
High Point, Thomasville & Dunton R.R.	58
Hoboken Manufacturers' R.R.	128
Houston Belt & Terminal Ry.	591
Helena & Northwestern Ry.	20
Illinois Central Railroad	21412
Illinois Northern Railway	407
Illinois Terminal R.R. System	876
Indiana Harbor Belt Railroad	7797
Indiana Northern Railway	41
Indianapolis Union Railway	429
International-Great Northern R.R. (Trustee)	2597
Inland Waterways Corp.	45
Kansas City Connecting R.R.	35
Kansas City Southern Railway	3228
Kansas City Terminal Railway Co.	290
Kentucky & Indiana Terminal R.R.	480
Kansas City, Kaw Valley R.R.	28
Lake Erie & Eastern R.R. Co.	803
Lake Superior & Ishpeming R.R.	131
Lake Terminal R.R.	1619
Lancaster & Chester Railway	29
Lehigh & Hudson River Railway	2256
Litchfield & Madison Railway	141
Live Oak, Perry & Gulf R.R.	57
London & Port Stanley Railway	15
Long Island Railroad	6872
Louisiana & Arkansas Railway	1972
Louisiana Southern R.R.	77
Louisville & Nashville R.R.	12574
Los Angeles Jct. R.R.	195

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Macon, Dublin & Savannah R.R.	182
Maine, Central Railroad	2489
Mainstee & Northeastern Ry.	48
Manufacturers' Railway	304
Manufacturers' Junction Ry. Co.	45
Meridian & Bigbee River Ry.	30
Midland Valley R.R.	382
Milwaukee Electric Ry. & Trans. Co.	5
Minneapolis & St. Louis R. R. (Rec'rs)	2131
Minneapolis, Northfield & Southern Ry.	202
Minneapolis, St. P. & S. Ste. Marie Ry.	4923
Mississippi Central R.R.	282
Missouri-Illinois R.R.	393
Missouri-Kansas-Texas R.R.	4695
Missouri Pacific R.R. (Trustee)	13343
Municipal Dicks & Term. (Jacksonv., Fla.)	28
Minnesota, Dakota & Western R.R.	68
Missippi Export R.R.	113
Napierville Junction Railway	53
Nashville, Chattanooga & St. Louis Ry.	3419
Natchez & Southern Ry.	39
National Railways of Mexico	3603
Newburg & South Shore Railway	953
New Jersey & New York R.R.	110
New Orleans & Lower Coast R.R.	169
New Orleans Public Belt R.R.	1502
New Orleans, Texas & Mexico Railway	2868
New York, Chicago & St. Louis R.R.	17088
New York, New Haven & Hartford R.R.	18124
New York, Ontario & Western Ry.	1468
Niagara Junction Railway	494
Norfolk & Portsmouth Belt Line R.R.	1030
Norfolk & Western Railway	6094
Norfolk Southern Ry.	2410
Northeast Oklahoma R.R.	103

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Northwestern Pacific R.R.	819
Northern Pacific Railway	8438
Northern Alberta Ry.	115
Oshawa Railway (Can. Nat'l Ry.)	73
Ohio & Morenci R.R.	6
Ontario Northland	301
Owasco River R.R.	5
Pacific Electric Ry.	699
Paris & Mount Pleasant R.R.	27
Patapsco & Black River R.R. Co.	2023
Peori Terminal Co.	191
Peoria & Perkin Union Railway	796
Piedmont & Northern Railway	374
Port Huron & Detroit R.R.	139
Potomac Edison Co.	223
Pennsylvania Reading Seashore Lines	3376
Pacific Great Eastern Railway	48
Quanah, Acme & Pacific Ry.	57
Rahway Valley R.R.	441
Raritan River R.R.	420
Richmond, Fredericksburg & Potomac R.R.	1546
River Terminal Railway	1061
Roberval & Saguenay Ry.	78
Rutland Railway Corp.	656
Sand Springs Ry. Co.	95
San Diego, Arizona & Eastern Ry.	140
St. Louis-San Francisco Railway (Trustee)	8159
St. Louis Southwestern	3349
Savannah & Atlanta Railway	418
Seaboard Air Line R.R.	12886

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Spokane Internat'l R.R.	98
South Buffalo Railway	2013
South Georgia Ry.	33
Southern Railway System	26762
Southern Pacific Co.—Pacific System	17715
Spokane, Portland & Seattle Railway	1804
Staten Island Rapid Transit Railway	1927
Sydney & Louisburg Ry.	89
South Omaha Term'l Ry.	29
Springfield Term'l Ry.	31
Springfield Suburban Ry.	24
Sacramento Northern Ry.	140
Sunset Railway Co.	31
St. Joseph Belt Railway Co.	5
St. Louis & O'Fallon Railway Co.	38
Tulsa Sapula Union Railway Co.	4
Tennessee, Alabama & Georgia Railway	77
Tennessee Central Railway	499
Terminal Ry. Alabama State Docks	298
Terminal R.R. Ass'n of St. Louis	4414
Texas Mexican Ry.	335
Texas & New Orleans R.R.	8997
Texas & Pacific Railway	4539
Texas Pacific—Missouri Pacific Terminal	105
Toledo, Peoria & Western Ry.	314
Toledo Terminal R.R.	379
Toronto, Hamilton & Buffalo Railway	753
Tremont & Gulf Railway	25
Tidewater Southern R.R.	54
Texas Southeastern R.R.	5
Union Pacific System	16033
Virginia Railway Co.	1057

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Wabash Railroad	4311
Waterloo, Cedar Falls & Northern R.R.	239
Western Pacific R.R.	1686
Western Railway of Alabama	777
Wharton & Northern R.R.	123
Wichita Falls & Southern R.R.	96
Winston-Salem Southbound Railway	135
Wrightsville & Tennille R.R.	85
Wyandotte Southern R.R.	26
Wyandotte Terminal R.R.	31
Wichita Valley	79
Youngstown & Northern R.R.	998
Youngstown & Southern	98
Abiline and Southern Ry.	4
Albany & Northern	24
Bay Terminal R.R.	1
Bane and Chelsea R.R.	54
Beaver Meade & Englewood R.R.	5
Central Indiana Rwy.	53
Charles City Western Rwy.	27
Chattahoochee Valley Rwy.	62
Chicago & Western Indiana R.R.	15
Chicago North Shore & Milwaukee Ry.	45
Chicago & Calumet River R.R.	16
Ferrocarril Nor O Easter De Mexico	174
Ferrocarril Mexicano	144
Flint Belt Ry.	28
Georgia Ashburn Sylvester & Camillia Ry.	29
Georgia Northern Ry.	39
Great Western Ry.	31
Hannibal Connecting R.R.	15
Hutchison & Northern	12
Howard Terminal Ry.	9

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
Interstate R.R.	10
Inter-California Ry.	11
Indiana & Michigan R.R.	3
Kansas City Public Service Co.	15
Kansas, Missouri Ry. & Terminal Co.	12
LaSalle & Bureau County R.R.	17
Lake Erie & Ft. Wayne R.R.	25
Louisville & Wadley R.R.	1
Louisiana-Northwest R.R.	13
Louisiana Midland R.R.	18
Larime, North Parks & Western R.R.	6
Manistique & Lake Superior R.R.	8
Mason City & Clear Lake R.R.	33
Minnesota Western R.R.	29
Middletown & New Jersey Ry.	10
Muncie & Western R.R.	30
Muskegon Ry. & Nav. Co.	195
Midland Continental R.R.	11
Nevada Northern Ry.	34
New Jersey, Indiana & Illinois R.R.	8
New York, Susquehanna & Western R.R.	609
Outer Harbor Terminal R.R.	2
Oakland Terminal Ry.	94
Pacific Coast Ry.	2
Prescott & Northwestern R.R.	14
Portland Traction Co.	33
Pacific Coast R.R.	29
Par Terminal R.R.	2
Quebec Ry. Lt. & Pr. Co.	3
Roscoe, Snyder & Pacific R.R.	40
Red River & Guld R.R.	7
Rock Island Southern Ry.	7
St. Johnsbury & Lamville County	76
St. Louis & Belleville Electric Ry.	20
Sioux City Terminal Ry.	14

EXHIBIT "Y-5"—Continued

Name of Company	*Car Days*
South Brooklyn Ry.	31
Southern Pacific R.R. of Mexico	293
San Diego & Arizona Eastern R.R.	11
Sonora Baja California Ry.	4
Texas-New Mexico Ry.	11
Toledo Angola & Western Ry.	26
Toledo & Eastern R.R.	15
Tyuana & Tecate R.R.	6
Tavares & Gulf R.R.	13
Union Freight R.R.	9
Union Terminal Ry.	57
Utah Ry.	44
Wadley Southern	16
	605678

1-30-53

Commonwealth's Exhibit No. 8
Exhibit "Y-6"

EXHIBIT "Y-6"

Allocation Within and Without Penna. of the Value of Defendant's Freight Cars at December 31, 1951, on a Car Day Ratio Basis

1. Maximum car days (D-1)			1,122,610.
2. (a) Car days on home road (D-1)	104,479		
(b) Car days roads operating in and out of Pennsylvania, allocated to Pennsylvania on basis of road miles (B-1)	135,455		
(c) Car days on roads operating only in Pennsylvania (C-1)	25,321		265,255.
3. Percent of car days in Pennsylvania to total car days (265255÷1,122,010)			.23641
4. Depreciated value of revenue freight cars (Y-1)			$10,080,600.
5. Depreciated value of revenue freight cars allocated to Pennsylvania (Line 4 x Line 3)			$ 2,383,155.
Depreciated value allocated out of Pa.			7,697,445

EXHIBIT "Z"

Allocation Within and Without Penna. of the Average Value of Defendant's Freight Cars on a Car Day Ratio Basis and of Diesel Freight Locomotives on a Mileage Operated Basis

(Page 2 Omitted by Agreement)

		Investment	Accrued Depreciation	Net Book Value	Assets in and Out of Penna.	Method of Allocating In and Out of Penna.	In Penna.	Outside Penna.
Road	Jan. 1, 1951	$ 579,962	$ 46,861	$ 533,101	$	Percent	$	$
	Dec. 31, 1951	590,277	71,877	518,400				
Total Road		1,170,239	118,738	1,051,501				
Average Road		585,120	59,369	525,751	None	In Penna. 100.	525,751	
Equipment:								
Diesel locos—Freight	Jan. 1, 1951	4,047,052	576,308	3,470,744		Mileage operated during 1951		
—Freight	Dec. 31, 1951	4,051,651	773,313	3,278,338		In Penna. 1,323,830 mi (56.5523%)		
Total Diesel locos—Freight		8,098,703	1,349,621	6,749,082				
Average Diesel locos—Switch		4,049,352	674,811	3,374,541	3,374,541		1,908,381	1,466,160
						Outside Penna. 1,017,064 mi (43.4477%)		
Diesel locos—Switch	Jan. 1, 1951	1,570,730	36,125	1,534,605				
Switch	Dec. 31, 1951	3,157,560	103,520	3,054,040				
Total Diesel locos—Switch		4,728,290	139,645	4,588,645				
Average Diesel locos—Switch		2,364,145	69,822	2,294,323	None	In Penna. 100.	2,294,323	
Freight train cars								
Unamortized	Jan. 1, 1951	8,483,702	677,817	7,805,885				
Amortized	Jan. 1, 1951	3,330,617	757,437	2,573,180				
Sub-total	Jan. 1, 1951	11,814,319	1,435,254	10,379,065		Car Days reported during 1951		
Unamortized	Dec. 31, 1951	8,464,273	876,710	7,587,563		In Penna. 265,255		
Amortized	Dec. 31, 1951	3,330,617	845,707	2,484,910		(23.641%)		
Sub-total	Dec. 31, 1951	11,794,890	1,722,417	10,072,473		Outside Pa. 856,755		
Total Freight train cars		23,609,209	3,157,671	20,451,538		(76.359%)		
Average Freight train cars		11,804,605	1,578,836	10,225,769	10,225,769		2,417,474	7,808,295

EXHIBIT "AA-1"

Freight Car Rentals Received from Railroad Lines Operating Within and Without Penna. and Basis of Allocation Within and Without Penna.

Road	Total Road Miles	Road Miles in Pa.	Per Cent Pa.	Total Revenue	Revenue to Pa. (Col. 3 x Col. 4)
Reading Company	1321.26	1244.77	94.21	$ 92,382.50	$ 87,033.55
Baltimore & Ohio	6186.59	1153.76	18.65	99,032.50	18,469.56
Delaware & Hudson	793.37	88.90	11.21	11,740.75	1,316.14
Erie	2354.90	620.77	26.36	35,775.25	9,430.36
D. L. & W.	964.16	250.12	25.94	27,140.75	7,040.31
Pennsylvania	10119.53	3993.32	39.46	200,649.75	79,176.39
New York Central	10724.53	788.95	7.36	160,823.25	11,836.59
Lehigh & New England	184.19	120.87	65.62	11,739.00	7,703.13
Lehigh Valley	1219.51	503.76	41.31	26,122.25	10,791.10
Western Maryland	835.50	240.98	28.84	8,480.50	2,445.78
Pittsburgh & West Virginia	131.79	105.41	79.98	1,919.75	1,535.42
Maryland & Pennsylvania	77.20	33.40	43.26	624.75	270.27
				$676,431.00	$237,048.60
				237,048.60	
		Revenue outside of Pennsylvania		439,382.40	

EXHIBIT "AA-2"

Freight car rentals received from railroad lines operating wholly within Penna.

Road	*Revenue*
Bellefont Central R. R.	$15.75
Bessemer & Lake Erie R. R.	2,642.50
Cambria & Indiana R. R.	586.25
Conemaugh & Black Lick R. R.	2,387.00
Cornwall R. R.	73.50
Donora Southern R. R.	579.25
East Erie Commercial R. R.	164.50
Etna & Montrose R. R.	138.25
Ironton R. R.	3,251.50
Johnston & Stony Creek R. R.	208.25
Monongahela Rwy.	2,703.75
Monongahela Connecting Rwy.	2,296.00
Montour R. R.	463.75
McKeesport Connecting R. R.	1,121.75
Northampton & Bath R. R.	222.25
Philadelphia, Bethlehem & New England R. R.	6,119.75
Pittsburgh & Ohio Valley R. R.	458.50
Pittsburgh & Shawmut R. R.	416.50
Pittsburgh, Chartier & Youghiogheny Ry.	892.50
Steelton & Highspire R. R.	1,536.50
Union Railroad	11,660.25
Upper Marion & Plymouth Railroad	6,210.75
Unity Rys.	80.50
Western Allegheny R. R.	3.50
Lake Erie Franklin & Clarion R. R.	57.75
New Haven & Dunbar R. R.	21.00
	$44,311.75

EXHIBIT "AA-3"

Freight car rentals received from railroad lines operating wholly without Penna.

Name of Company	*Revenue*
Aberdeen & Rockfish R. R.	$173.25
Akron & Barberton Belt R. R.	651.00
Akron, Canton & Youngstown Ry.	715.75
Alabama, Tennessee & Northern R. R.	290.50
Algoma Central & Hudson Bay Ry.	1,025.50
Alton & Southern R. R.	1,069.25
Ann Arbor R. R. (Rec'rs)	973.00
Arkansas & Louisiana Missouri Ry.	157.50
Atchison, Topeka & Santa Fe Ry.	35,535.50
Atlantic Coast Line R. R.	26,834.50
Atlantic & East Carolina R. R.	378.00
Atlanta & St. Andrews Bay Ry.	175.00
Alameda Belt Line	171.50
Atlantic & Danville Ry.	505.75
Anna-Jonesboro R. R.	28.00
Baltimore & Ohio Chicago Terminal	6,062.00
Bamberger R. R.	70.00
Bangor & Aroostook R. R.	801.50
Belt Railway Co. of Chicago	6,489.00
Berlin Mills Co.	283.50
Birmingham Southern R. R. Co.	1,109.50
Boston & Maine R. R.	15,933.75
Buffalo Creek R. P.	794.50
Butte Anaconda & Pacific R. R.	91.00
British Columbia Elec. Ry.	57.75
Bonhomie, Hattiesburg Southern R. R.	64.75
Benwovel & Wheeling Com. Ry. Co.	127.75
Canadian National Railways	34,137.25
Central R. R. Co. of New Jersey	100,955.75
Canadian Pacific Railway	20,384.00
Canton & Carthage R. R.	57.75
Canton Railroad	1,207.50

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Cedar Rapids & Iowa City Railway	$259.00
Central Calif. Traction Co.	38.50
Central of Georgia Railway	7,836.50
Central Vermont Railway, Inc.	1,664.25
Charleston & Western Carolina Ry.	1,057.00
Chesapeake & Ohio Railway C & O Dist.	15,515.50
Chesapeake & Ohio Ry. Pere Marq. Dist.	10,088.75
Chesapeake Western Railway	77.00
Chicago & Eastern Illinois R. R.	3,640.00
Chicago & Illinois Midland Railway	1,146.25
Chicago & Illinois Western R. R.	297.50
Chicago & Northwestern Ry.	34,419.00
Chicago, Burlington & Quincy R. R.	24,934.00
Chicago, Great Western R. R.	6,186.25
Chicago Heights Terminal Transfer R. R.	458.50
Chicago, Indianapolis & Louisville Ry.	3,431.75
Chicago, Milwaukee, St. P. & Pac. R. R.	37,926.00
Chicago Short Line Ry.	330.75
Chicago, Rock Island & Pacific R. R.	24,830.75
Chicago, West Pullman & Southern R. R.	651.00
Clinchfield, Railroad	1,482.26
Colorado & Southern Railway	1,048.25
Colorado & Wyomnig Ry.	516.25
Columbia, Newberry & Laurens R. R.	85.75
Columbus & Greenville Ry.	474.25
Copper Range R. R.	147.00
Cumberland & Pennsylvania R. R.	59.50
Chicago River & Indiana R. R. Co.	2,696.75
Chicago, So. Shore & So. Bend R. R.	192.50
Cuyahoga Valley Ry. Co.	943.25
Chicago, Aurora & Elgin R. R. (Rec'rs)	26.25
Davenport, Rock Island & Northwestern Ry.	82.25
Delray Connecting R. R.	427.00
Denver & Rio Grande Western R. R.	3,881.50
Des Moines & Central Iowa R. R.	140.00

Commonwealth's Exhibit No. 8
Exhibit "AA-3"

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Des Moines Union Railway	$428.75
Detroit & Mackinac Railway	689.50
Detroit & Toledo Shore Line R. R.	1,277.50
Detroit Terminal R. R.	1,960.00
Detroit, Toledo & Ironton R. R.	3,445.75
Duluth, Missabe & Iron Range R. R.	1,123.50
Duluth, South Shore & Atlantic Ry.	1,219.75
Duluth, Winnipeg & Pacific Railway	351.75
Durham & Southern Railway	124.25
Duluth & Northeastern R. R.	234.50
Denver & Intermountain R. R.	24.50
East St. Louis Junction R. R.	138.25
Elgin, Joliet & Eastern R. R.	18,513.25
Essex Terminal Railway	528.50
Escanaba & Lake Superior R. R.	92.75
Ferrocarril, Kans. City, Mexico y'Oriente	161.00
Fairport, Painesville & Eastern Railroad	271.25
Florida East Coast Railway	2,955.75
Ft. Dodge, Des Moines & So. R. R. (Trustee)	719.25
Fort Worth & Denver Railway	2,220.75
Forth Worth Belt R. R.	47.25
Fernwood, Columbia & Gulf R. R.	129.50
Gainesville Midland R. R.	164.50
Galveston, Houston & Henderson R. R.	64.75
Georgia Railroad	1,330.00
Georgia & Florida Railway (Rec'rs)	1,036.00
Grand Trunk Railway System (W. L.)	11,145.75
Graysonia, Nashville & Ashdown R. R.	59.50
Great Northern Railway	16,892.75
Green Bay & Western Railroad	570.50
Gulf, Mobile & Ohio R. R.	13,233.50
High Point, Thomasville & Dunton R. R.	101.50
Hoboken Manufacturers' R. R.	224.00
Houston Belt & Terminal Ry.	1,034.25
Helena & Northwestern Ry.	35.00

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Illinois Central Railroad	$37,471.00
Illinois Northern Railway	712.25
Illinois Terminal R. R. System	1,533.00
Indiana Harbor Belt Railroad	13,644.75
Indiana Northern Railway	71.75
Indianapolis Union Railway	750.75
International-Great Northern R. R. (Trustee)	4,544.75
Inland Waterways Corp.	78.75
Kansas City Connecting R. R.	61.25
Kansas City Southern Railway	5,649.00
Kansas City Terminal Railway Co.	507.50
Kentucky & Indiana Terminal R. R.	840.00
Kansas City, Kaw Valley R. R.	49.00
Lake Erie & Eastern R. R. Co.	1,405.25
Lake Superior & Ishpeming R. R.	229.25
Lake Terminal R. R.	2,833.25
Lancaster & Chester Railway	50.75
Lehigh & Hudson River Railway	2,948.00
Litchfield & Madison Railway	246.75
Live Oak, Perry & Gulf R. R.	99.75
London & Port Stanley Railway	26.25
Long Island Railroad	12,026.00
Louisiana & Arkansas Railway	3,451.00
Louisiana Southern R. R.	134.75
Louisville & Nashville R. R.	22,004.50
Los Angeles Jct. R. R.	341.25
Macon, Dublin & Savannah R. R.	318.50
Maine Central Railroad	4,355.75
Mainstee & Northeastern Ry.	84.00
Manufacturers' Railway	532.00
Manufacturers' Junction Ry. Co.	78.75
Meridian & Bigbee River Ry.	52.50
Midland Valley R. R.	668.50
Milwaukee Electric Ry. & Trans. Co.	8.75
Minneapolis & St. Louis R. R. (Rec'rs)	3,729.25

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Minneapolis, Northfield & Southern Ry. .	$353.50
Minneapolis, St. P. & S. Ste. Marie Ry. .	8,615.25
Mississippi Central R. R.	493.50
Missouri-Illinois R. R.	687.75
Missouri-Kansas-Texas R. R.	8,216.25
Missouri Pacific R. R. (Trustee)	23,350.25
Municipal Docks & Term. (Jacksonv., Fla.)	49.00
Minnesota, Dakota & Western R. R.	119.00
Mississippi Export R. R.	197.75
Napierville Junction Railway	92.75
Nashville, Chattanooga & St. Louis Ry. .	5,983.25
Natchez & Southern Ry.	68.25
National Railways of Mexico	6,305.25
Newburg & South Shore Railway	1,667.75
New Jersey & New York R. R.	192.50
New Orleans & Lower Coast R. R.	295.75
New Orleans Public Belt R. R.	2,628.50
New Orleans, Texas & Mexico Railway ..	5,019.00
New York, Chicago & St. Louis R. R. ...	29,904.00
New York, New Haven & Hartford R. R.	31,717.00
New York, Ontario & Western Ry.	2,569.00
Niagara Junction Railway	864.50
Norfolk & Portsmouth Belt Line R. R. ..	1,802.50
Norfolk & Western Railway	10,664.50
Norfolk Southern Ry.	4,217.50
Northeast Oklahoma R. R.	180.25
Northwestern Pacific R. R.	1,433.25
Northern Pacific Railway	14,766.50
Northern Alberta Ry.	201.25
Oshawa Railway (Can. Nat'l Ry.)	127.75
Ohio & Morenci R. R.	10.50
Ontario Northland	526.75
Owasco River R. R.	8.75
Pacific Electric Ry.	1,223.25
Paris & Mount Pleasant R. R.	47.25

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Patapsco & Black Rivers R. R. Co.	$3,540.25
Peoria Terminal Co.	334.25
Peoria & Pekin Union Railway	1,393.00
Piedmont & Northern Railway	654.50
Port Huron & Detroit R. R.	243.25
Potomac Edison Co.	390.25
Pennsylvania Reading Seashore Lines	5,908.00
Pacific Great Eastern Railway	84.00
Quannah, Acme & Pacific Ry.	99.75
Rahway Valley R. R.	771.75
Raritan River R. R.	735.00
Richmond, Fredericksburg & Potomac R. R.	2,705.50
River Terminal Railway	1,856.75
Roberval & Saguenay Ry.	136.50
Rutland Railway Corp.	1,148.00
Sand Springs Ry. Co.	166.25
San Diego, Arizona & Eastern Ry.	245.00
St. Louis-San Francisco Railway (Trustee)	14,278.25
St. Louis Southwestern	5,860.75
Savannah & Atlanta Railway	731.50
Seaboard Air Line R. R.	22,550.50
Spokane Internat'l R. R.	171.50
South Buffalo Railway	3,522.75
South Georgia Ry.	57.75
Southern Railway System	46,833.50
Southern Pacific Co.-Pacific System	31,01.25
Spokane, Portland & Seattle Railway	3,157.00
Staten Island Rapid Transit Railway	2,372.25
Sydney & Louisburg Ry.	155.75
South Omaha Term'l Ry.	50.25
Springfield Term'l Ry.	54.25
Springfield Suburban Ry.	42.00
Sacramento Northern Ry.	245.00
Sunset Railway Co.	54.25

Commonwealth's Exhibit No. 8
Exhibit "AA-3"

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
St. Joseph Belt Railway Co.	$8.75
St. Louis & O'Fallon Railway Co.	66.50
Tulsa-Sapula Union Railway Co.	7.00
Tennessee, Alabama & Georgia Railway	134.75
Tennessee Central Railway	873.25
Terminal Ry. Alabama State Docks	521.50
Terminal R. R. Ass'n of St. Louis	7,724.50
Texas Mexican Ry.	586.25
Texas & New Orleans R. R.	15,744.75
Texas & Pacific Railway	7,943.25
Texas, Pacific-Missouri Pacific Terminal	183.75
Toledo, Peoria & Western Ry.	549.50
Toledo Terminal R. R.	663.25
Toronto, Hamilton & Buffalo Railway	1,317.75
Tremont & Gulf Railway	43.75
Tidewater Southern R. R.	94.50
Texas Southeastern R. R.	8.75
Union Pacific System	28,057.75
Virginian Railway Co.	1,832.50
Wabash Railroad	14,544.25
Waterloo, Cedar Falls & Northern R. R.	418.25
Western Pacific R. R.	2,950.50
Western Railway of Alabama	1,359.75
Wharton & Northern R. R.	215.25
Wichita Falls & Southern R. R.	168.00
Winston-Salem Southbound Railway	236.25
Wrightsville & Tennille R. R.	148.75
Wyandotte Southern R. R.	45.50
Wyandotte Terminal R. R.	54.25
Wichita Valley	138.25
Youngstown & Northern R. R.	1,746.50
Youngstown & Southern	171.50
Abiline and Southern Ry.	7.00
Albany & Northern	42.00
Bay Terminal R. R.	1.75
Bane and Chelsea R. R.	94.50

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
Beaver Meade & Englewood R. R.	$8.75
Central Indiana Rwy.	92.75
Charles City Western Rwy.	47.25
Chattahoochee Valley Rwy.	108.50
Chicago & Western Indiana R. R.	26.25
Chicago North Shore & Milwaukee Ry.	78.75
Chicago & Calumet River R. R.	28.00
Ferrocarril Nor O Easter De Mexico	304.50
Ferrocarril Mexicano	252.00
Flint Belt Ry.	49.00
Georgia Ashburn Sylvester & Camillia Ry.	50.75
Georgia Northern Ry.	68.25
Great Western Ry.	54.25
Hannibal Connecting R. R.	26.25
Hutchison & Northern	21.00
Howard Terminal Ry.	15.75
Interstate R. R.	17.50
Inter-California Ry.	19.25
Indiana & Michigan R. R.	5.25
Kansas City Public Service Co.	26.25
Kansas, Missouri Ry. & Terminal Co.	21.00
LaSalle & Bureau County R. R.	29.75
Lake Erie & Ft. Wayne R. R.	43.75
Louisville & Wadley R. R.	1.75
Louisiana-Northwest R. R.	22.75
Louisiana Midland R. R.	31.50
Larime, North Parks & Western R. R.	10.50
Manistique & Lake Superior R. R.	14.00
Mason City & Clear Lake R. R.	57.75
Minnesota Western R. R.	50.75
Middletown & New Jersey Ry.	17.50
Muncie & Western R. R.	52.50
Muskegon Ry. & Nav. Co.	341.25
Midland Continental R. R.	19.25
Nevada Northern Ry.	59.50

Commonwealth's Exhibit No. 8
Exhibit "AA-3"

EXHIBIT "AA-3"—Continued

Name of Company	*Revenue*
New Jersey, Indiana & Illinois R. R.	$14.00
New York, Susquehanna & Western R. R.	1,065.75
Outer Harbor Terminal R. R.	3.50
Oakland Terminal Ry.	164.50
Pacific Coast Ry.	3.50
Prescott & Northwestern R. R.	24.50
Portland Traction Co.	57.75
Pacific Coast R. R.	50.75
Parr Terminal R. R.	3.50
Quebec Ry. Lt. & Pr. Co.	5.25
Roscoe, Snyder & Pacific R. R.	70.00
Red River & Guld R. R.	12.25
Rock Island Southern Ry.	12.25
St. Johnsbury & Lamville County	133.00
St. Louis & Belleville Electric Ry.	35.00
Sioux City Terminal Ry.	24.50
South Brooklyn Ry.	54.25
Southern Pacific R. R. of Mexico	512.75
San Diego & Arizona Eastern R. R.	19.25
Sonora Baja California Ry.	7.00
Texas-New Mexico Ry.	19.25
Toledo Angola & Western Ry.	45.50
Toledo & Eastern R. R.	26.25
Tyuana & Tecate R. R.	10.50
Tavares & Gulf R. R.	22.75
Union Freight R. R.	15.75
Union Terminal Ry.	99.75
Utah Ry.	77.00
Wadley Southern	28.00
	$1,059,936.50

EXHIBIT "AA-4"

Allocation of Total Freight Car Per Diem Rates Within and Without Penna.

Total per diem car hire		$1,780,679.25
Allocated to Pennsylvania:		
(a) Car days at $1.75 per day for roads operating in and out of Pennsylvania allocated to Pennsylvania on basis of road miles (Statement "AA-1")	$237,048.60	
(b) Car days at $1.75 per day for roads operating only in Pennsylvaria (Statement "AA-3")	44,311.75	
		281,360.35
Allocated outside of Pennsylvania		$1,499,318.90

EXHIBIT "BB"

Capital Stock Tax Settlement 1951

(Printed as Exhibit "A", Appeal and Specification of Objections at page 10a, supra.)

EXHIBIT "CC"

Order Refusing Petition for Resettlement

(Printed as Commonwealth's Exhibit No. 3 at page 30a, supra.)

EXHIBIT "DD"

Order Refusing Petition for Review

(Printed as Commonwealth's Exhibit No. 6 at page 36a, supra.)

COMMONWEALTH'S EXHIBIT NO. 9

Amendment to Stipulation of Facts

AND NOW, January 8, 1957, it is agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for Central Railroad Company of Pennsylvania, defendant, that Paragraph 25 of the Stipulation of Facts is hereby amended by continuing and adding to the last sentence of said paragraph the following:

> "* * * but it is not known by the parties hereto on what basis such taxes are or are not imposed by such states on the value of rolling stock and equipment of these railroads used on the lines of other railroads in such states or other states for which the using railroad pays a per diem rate pursuant to Exhibit "X" attached hereto."

/s/ GEORGE W. KEITEL
Deputy Attorney General of the Commonwealth of Pennsylvania

HULL, LEIBY AND METZGER

By ROY J. KEEFER
Attorney for Defendant.

COMMONWEALTH'S EXHIBIT NO. 10

STIPULATION TO TRY WITHOUT JURY

It is hereby agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an act entitled "An Act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury", approved the 22nd day of April, 1874, P. L. 109, subject, however, to a writ of error as in other cases, at the option of either party.

GEORGE W. KEITEL

GEORGE W. KEITEL,
Deputy Attorney General.

HULL, LEIBY & METZGER,
By ROY J. KEEFER

ROY J. KEEFER,
Counsel for Defendant.

DEFENDANT'S EXHIBIT NO. 1

Appeal and Specification of Objections

Printed as Item II at page 3a, supra.

DEFENDANT'S EXHIBIT NO. 2

Bond on Appeal from Settlement of An Account by the Secretary of Revenue and the Auditor General

Filed December 22, 1954 (Not printed).

IV

RELEVANT EXCERPTS FROM TAXING STATUTE

Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, 72 Purdon's Statutes, §§ 1871, 1901 and 1902, as amended to 1952:

Section 20, as last amended by the Act of May 16, 1945, P. L. 606:

"Section 20. That hereafter, **** it shall be the duty of every **** corporation, *** now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation **** now or hereafter incorporated or organized by or under the law of any other state ***, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth ****, to make annually on or before the fifteenth of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First, the amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its revenue account, together with the disposition of any net revenue, and the profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation ****, at its actual value in cash as it existed at the close of the year for which the report is made.

* * * * *

The affidavit of two of the officers of such corporation *** shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; taking into consideration, first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness ****."

Section 21, as last amended by the Act of May 29, 1951, P. L. 462:

Section 21(a). Every domestic corporation ****, and every *** company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the treasury of the

Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including, common, special and preferred, as ascertained in the manner as prescribed in said twentieth section: ****."

* * * * *

"Section 21(c). **** Provided further, That corporations ***, liable to a tax under this section, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders or members, as such, have the entire equitable interest in reminder; ****."

V

COMMONWEALTH'S REQUESTS FOR FINDINGS OF FACT

1. Defendant is a Pennsylvania corporation incorporated for the purpose of "constructing, maintaining and operating a railroad ***" (S/F 2).

Affirmed.

2. Defendant's shares were wholly owned by its parent company, the Central Railroad Company of New Jersey, a New Jersey corporation, hereinafter referred to as CNJ (S/F 5).

Affirmed.

3. All of defendant's track mileage (206.74 miles) is located in Pennsylvania, and connects with the lines of CNJ at the Pennsylvania-New Jersey border at Easton (S/F 4).

Affirmed.

4. Prior to August 5, 1946, the defendant railroad lines in Pennsylvania were operated under lease by CNJ with its own equipment (S/F 5).

Affirmed.

5. On August 5, 1946, defendant and CNJ entered into a Lease Agreement under which by direct ownership or subleases, defendant took over the operation of the said railroad lines in Pennsylvania and leased certain property and equipment from CNJ. Defendant from time to time thereafter purchased other rolling stock and equipment as needed (S/F 5).

Affirmed.

6. On August 5, 1946, defendant and CNJ entered into an operating agreement and supplemental operat-

ing agreement which was in full force and effect during 1951 (S/F 5).

Affirmed.

7. The general officers of CNJ, defendant's parent also were the general officers of the defendant (S/F 6, Exhibits "C" and "D"). CNJ paid all salaries and expenses of such officers, and defendant reimbursed CNJ to the extent of 32% thereof for officers and employees in freight and passenger departments and 22% for officers and employees in other departments (S/F 5).

Affirmed.

8. Subordinate employees of the defendant were on the payroll of CNJ when engaed in certain functions of the defendant under the control of an officer or other duly constituted official of CNJ acting in his capacity as officer or official of defendant; and defendant reimbursed CNJ for its portion of wages and salaries paid by CNJ (S/F 8 and 9).

Affirmed.

9. The defendant reimbursed CNJ for a percentage of rentals paid by CNJ for offices on the basis of 32% for offices used by the traffic department and 22% for other space (S/F 9).

Affirmed.

10. Defendant is not qualified or authorized to do business in any State other than Pennsylvania. It does not pay franchise or property taxes to states other than Pennsylvania (S/F 12).

Affirmed.

11. Defendant as a Member of the Association of American Railroads entered into a "car service and per diem agreement" effective during 1951, under which the defendant was paid a per diem rate for its

freight cars while on the lines of other railroads (S/F 13, Exhibit "X"; Exhibit "A", Section 5(a)).

Affirmed.

12. When defendant's freight cars were employed on the lines of other railroads, they were under the sole operation and control of such other railroads, and not subject to control of the defendant (S/F, Exhibit "X").

Affirmed.

13. In the course of through freight shipments originating on defendant's lines in Pennsylvania or on the lines of CNJ in New Jersey, defendant's Diesel locomotives and freight cars were run on fixed routes and regular schedules in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ, its parent company, in New Jersey, and for such use defendant received compensation in accordance with the operating agreement and supplemental operating agreement (S/F Exhibits "A" and "B").

Affirmed.

14. In settling capital stock tax reports of railroad companies having railroad track mileage inside and outside of Pennsylvania for the year 1951, the taxing officers allocated in and out of Pennsylvania rolling stock of the railroad by multiplying the total value of such rolling stock by a fraction having as its numerator the track mileage outside of Pennsylvania and as its denominator the total track mileage. The capital stock tax reports filed by such railroads did not indicate that the rolling stock to which the track mileage ratio was applied included freight cars for which they received per diem car hire while on the lines of other railroads, pursuant to the provisions of the "Car Service and Per Diem Agreement", which is attached hereto as Exhibit "X", but it must necessarily be presumed

that the value of such freight cars was included in the reported value of such rolling stock. It is assumed by the parties hereto that such railroad companies having railroad track mileage inside and outside of Pennsylvania pay franchise or property taxes to the other states in which a portion of the railroad track mileage is located, but it is not known by the parties hereto on what basis such taxes are or are not imposed by such states on the value of rolling stock and equipment of these railroads used on the lines of other railroads in such states or other states for which the using railroad pays a per diem rate pursuant to Exhibit "X" attached hereto (S/F 25).

Affirmed.

15. CNJ received a certificate of authority from the Commonwealth of Pennsylvania on April 2, 1912, stating as its purpose "the operation of a railroad". During the year 1951, CNJ rented two offices in Pennsylvania at Philadelphia, and Pittsburgh and used defendant's office at Wilkes-Barre from which it solicited railroad freight business. During 1951, CNJ received compensation from defendant for use of freight cars on a per diem basis as per Exhibit "X" and for the use of Diesel locomotives pursuant to Exhibits "A" and "B" which were used on scheduled runs from points in New Jersey over the tracks of CNJ to points in Pennsylvania over the tracks of defendant. The said CNJ filed franchise and corporate net income tax reports with the Commonwealth of Pennsylvania for the year 1951 on which it reported that no business was transacted within Pennsylvania during the year (S/F 26).

Affirmed.

16. Rentals received in 1951 by the defendant for the use of its Diesel locomotives on the lines of CNJ included an amount equal to the Pennsylvania 5 mills

capital stock tax thereon (S/F Exhibit "A", Schedule A, Exhibit "B").

Affirmed.

17. The operation of through trains either originating on, or destined for, defendant's tracks in Pennsylvania was the complete responsibility of the CNJ and not the defendant while such trains were operated in New Jersey (S/F Exhibit "A", Section 10).

Affirmed.

Respectfully submitted,

GEORGE W. KEITEL,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.
Counsel for Commonwealth of Pennsylvania.

VI

COMMONWEALTH'S REQUESTS FOR CONCLUSIONS OF LAW

1. Defendant is a Pennsylania corporation which was engaged in Pennsylvania in the operation of a railroad during 1951, and was not engaged in the business of operating a railroad in any other state.

Affirmed.

2. Defendant's freight cars operated on tracks of other railroads outside Pennsylvania under per diem rental agreements did not thereby acquire any situs outside of Pennsylvania for taxation, and were therefore taxable in Pennsylvania, the domicile of defendant.

Affirmed.

3. Defendant's Diesel locomotives used on tracks of CNJ, parent of the defendant, did not acquire tax situs in the State of New Jersey.

Affirmed.

4. The taxing officers of the Commonwealth of Pennsylvania correctly refused to allocate outside of Pennsylvania either the defendant's freight cars used by other railroads subject to car hire, or its Diesel locomotives leased by CNJ.

Affirmed.

5. Defendant has failed to show that any of its freight cars or Diesel locomotives became permanently located or acquired a tax situs in any state other than Pennsylvania during 1951.

Affirmed.

6. Freight car hire for days of use on other railroads is not a valid test for determining either the location of a specific car or the tax situs of a specific car.

Affirmed.

7. Since the defendant was not subject to capital stock or franchise taxes in any other state during 1951, an allocation of a portion of its freight cars or Diesel locomotives outside of Pennsylvania was not necessary in order to avoid double taxation.

Affirmed.

8. While the defendant's freight cars and Diesel locomotives were being used by other railroads outside of Pennsylvania, such cars and locomotives were not being used in the business of the defendant, which is not in the business of operating a railroad outside of Pennsylvania, and while so used, defendant's freight cars and Diesel locomotives were under the sole operation and control of the hiring or lessee railroads, and were part of trains and equipment operated by the hiring or lessee railroads.

Affirmed.

9. There was no lack of uniformity in the taxation of the defendant in the present case, because all railroads which received a track mileage allocation actually had tracks in other states, were doing business there, and paid franchise or property taxes there (S/F 25).

Affirmed.

10. The lending or leasing of tangible personal property by the defendant, a Pennsylvania corporation, for temporary use in transit within or outside of Pennsylvania, does not constitute doing business outside of Pennsylvania or the doing of an interstate railroad business; and even if it should be determined that the defendant is engaged in part in interstate commerce, its tangible personal property having a situs in Pennsylvania would be subject to the Pennsylvania Capital Stock Tax, a property tax, and such tax would not violate the Commerce Clause of the Constitution of the United States.

Affirmed.

11. The capital stock tax settlement made against the defendant for 1951 met all the requirements of due process, since all of defendant's rolling stock had its tax situs in Pennsylvania, and none of it was subject to taxation in, or actually taxed by, any other state.

Affirmed.

12. The following evidence contained in the Stipulation of Facts is excluded as irrelevant and immaterial, having been objected to by the Commonwealth, as permitted by the agreement of the parties (S/F 29): Paragraphs 7, 8, 9, 10, 11, 15, 17, 18, 19, and 20 of the Stipulation of Facts.

Refused.

13. The capital stock tax settlement made against the defendant for the year 1951 did not violate any provision of the Constitution of Pennsylvania or the Constitution of the United States.

Affirmed.

14. Judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the amount of $97,271.63 which, having been paid, should be marked satisfied (S/F 27).

Affirmed.

Respectfully submitted,

GEORGE W. KEITEL,
Deputy Attorney General.
THOMAS D. MCBRIDE,
Attorney General.
Counsel for Commonwealth of Pennsylvania.

VII

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT

And now, January 9, 1958, Central Railroad Company of Pennsylvania, Defendant herein, by its attorney, Roy J. Keefer, respectfully requests your Honorable Court to make specific Findings of Fact in the determination of the above case as agreed to by the parties in Paragraphs 2 to 25 inclusive, and Paragraphs 27 and 28 of the Stipulation of Facts; and in the Amendment to the Stipulation of Facts. (Commonwealth's Exhibits 8 and 9).

Respectfully submitted,

Roy J. Keefer
Hull, Leiby and Metzger
Attorneys for the Defendant.

VIII

DEFENDANT'S REQUESTS FOR CONCLUSIONS OF LAW

And now, January 9, 1958, Central Railroad Company of Pennsylvania, Defendant herein, by its attorney, Roy J. Keefer, requests your Honorable Court to make and adopt the following Conclusions of Law as applicable to the determination of this cause:

1. The tax imposed on the capital stock of domestic corporations by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, 72 Purdon's Statutes Sections 1871 and 1901, is a property tax.

Affirmed.

2. The capital stock tax settlement against Defendant for the year 1951 was made by the Department of Revenue and the Department of the Auditor General pursuant to the purported provisions of Sections 20 and 21 of said Act of 1889, as amended.

Affirmed.

3. During the year 1951, Defendant maintained general offices outside of Pennsylvania at 143 Liberty Street, New York 6, New York; Jersey City and Elizabethport, New Jersey; and off-line freight offices at Albany, Buffalo, Boston, Cleveland, St. Louis, Chicago, Detroit, Newark and Long Branch (New Jersey).

Refused.

4. Certain general officers, subordinate officials and employees on the payroll of The Central Railroad Company of New Jersey served in a similar capacity, and rendered services, for the Defendant; and in so doing, the relationship between them and Defendant was that of employer and agent and/or employee; and for such services Defendant paid their wages and sal-

aries which appear as such in Defendant's books of account.

Refused.

5. During the year 1951, Defendant was engaged outside of Pennsylvania in transacting a substantial part of its business of "maintaining and operating a railroad for public use in conveyance of persons and property".

Refused.

6. In the course of through freight shipments originating on its own lines in Pennsylvania or on the lines of CNJ in New Jersey, Defendant's diesel locomotives and freight cars were run regularly, continuously and habitually on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey; and its diesel locomotives acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of mileage operated outside of Pennsylvania to total mileage operated; and its freight cars acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of car days on the lines of CNJ outside of Pennsylvania to total car days everywhere.

Refused.

7. The flow of freight cars to and from Defendant with attendant benefits and liabilities, under the Car Service and Per Diem Agreement, constitutes a part of Defendant's business of maintaining and operating a railroad.

Refused.

8. In the course of through freight shipments extending over the lines of other railroads and under the Car Service and Per Diem Agreement, Defendant's freight cars were regularly, habitually and/or continuously employed on the lines of other railroads operating

wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania; and acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of car days outside of Pennsylvania to total car days everywhere or to the extent of the ratio of gross car rentals outside of Pennsylvania to total gross car rentals everywhere.

Refused.

9. An average number of Defendant's freight cars acquired a situs outside of Pennsylvania by reason of regular, habitual and continuous presence outside of Pennsylvania; and in the absence of determination of such average number based on direct proof, it is appropriate to make such determination based on car day or gross rental ratios within and without the State.

Refused.

10. One Thousand and Twenty-four (1024) of Defendant's freight cars acquired a situs outside of Pennsylvania for property tax purposes on the basis of direct proof that such number was continuously outside of Pennsylvania throughout the entire year 1951.

Refused.

11. Other states have the power under Due Process of the Laws to impose property tax upon the average number of Defendant's freight cars regularly, habitually and/or continuously present therein during the year 1951, regardless of Defendant's domicile and regardless of whether or not Defendant is doing business therein; and the existence of this power to tax, whether exercised or not, precludes Pennsylvania, the domiciliary State, from imposing property tax upon full value of *all* of Defendant's freight cars.

Refused.

12. The capital stock tax settlement made against Defendant violates the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, because it is the intent of said Act not to authorize the imposition of the capital stock tax on Defendant's diesel locomotives and freight cars located or having a situs outside of the State.

Refused.

13. The capital stock tax settlement made against Defendant violates the due process of the laws provisions of Sections 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States because therein the capital stock tax, which is a property tax, is imposed upon Defendant's diesel locomotives and freight cars located or having a situs outside of the State and as to which the laws of Pennsylvania did not afford protection, opportunities and benefits throughout the year 1951.

Refused.

14. The capital stock tax settlement made against Defendant violates the Commerce Clause (Section 8, Clause 3 of Article I) of the Constitution of the United States in that the taxation by Pennsylvania of the entire value, or all, of Defendant's diesel locomotives and freight cars under the facts in the case constitutes, or exposes Defendant to, multiple taxation of interstate operations and such taxation has no relation to the opportunities, benefits or protection which Pennsylvania, the taxing state, gives those operations.

Refused.

15. The capital stock tax settlement made against Defendant violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal pro-

tection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the entire value, or all, of the diesel locomotives and freight cars or similar property of other corporations, domiciliary to Pennsylvania, which are in the same class as Defendant, is not subjected to capital stock tax under similar circumstances as in the case of Defendant.

Refused.

16. Certain facts agreed upon by counsel for the respective parties, contained in Paragraph Twenty Six (26) of the Stipulation of Facts and objected to therein by counsel for Defendant as being irrelevant and immaterial, should be excluded from the evidence considered by the Court because they relate to The Central Railroad Company of New Jersey and have no bearing or application in the determination of Defendant's liability to, or exemption from, capital stock tax for 1951.

Refused.

17. The Board of Finance and Revenue erred in making the following decision:

> "And now to wit October 20, 1954,
>
> "This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of the Auditor General, is hereby sustained."

Refused.

18. The appeal is sustained at the cost of the Commonwealth.

Refused.

19. Judgment should be entered in favor of the Commonwealth and against the Defendant in the amount of Sixty Two Thousand Seven Hundred Fifty Dollars and Seventy Cents ($62,750.70), computed pursuant

to Paragraph 28 of the Stipulation of Facts, which, having been overpaid, should be marked satisfied, and said judgment should order a credit of Thirty-Four Thousand Five Hundred Twenty Dollars and Ninety-four cents ($34,520.94) to be entered in favor of Defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General.

Refused.

Respectfully submitted,

ROY J. KEEFER

HULL, LEIBY AND METZGER
Attorneys for the Defendant

IX

OPINION FILED WITH JUDGMENT NISI

By THE COURT:

The capital stock tax of the defendant for the year 1951 was settled in the amount of $97,271.64. Resettlement and review having been refused, this appeal followed. At the hearing before the court, a stipulation was filed to try the case without a jury pursuant to the provisions of the Act of 1874, P. L. 109. Some testimony was taken in which various exhibits were introduced into evidence, including a Stipulation of Facts. This stipulation reserved to the parties the right to object to the admissibility of any parts thereof. As a result, both the defendant and the Commonwealth have objected to certain portions, on the grounds of irrelevancy and materiality. We overrule these objections. Consequently, we find the facts to be as set forth in the stipulation. They are entirely too voluminous to be set forth herein, but we incorporate them by way of reference. We shall, however, set forth what we consider to be the salient parts thereof.

The defendant is a Pennsylvania corporation chartered to operate a railroad. All its lines lie wholly within this state and extend from the anthracite region of Pennsylvania to the New Jersey line, where they connect with the lines of the Central Railroad of New Jersey, hereinafter referred to as CNJ. The defendant is a wholly owned subsidiary of CNJ. Prior to 1946, the CNJ operated the defendant's lines, under lease, with its own equipment. However, in 1946, the defendant took over the operation of its lines and leased certain property and equipment from CNJ. Thereafter it acquired certain deisel locomotives and cars. At that time certain operating agreements were executed by the defendant and CNJ. The general officers and sub-

ordinate officials of the defendant were generally the same as those of CNJ, and were paid by the latter. CNJ was then reimbursed by the defendant for wages and salaries expended by it for work done for the defendant.

The defendant was not authorized to do business in any other State and paid no corporate taxes to any other State. In the tax year in question CNJ reported to the Commonwealth of Pennsylvania that it transacted no business in Pennsylvania.

When the cars of the defendant were on the lines of other railroads it was compensated therefor, on a per diem basis. When the cars or deisel locomotives of the defendant were on the lines of CNJ, it was compensated therefor in accordance with the terms of the operating agreements between the parties.

The defendant made a one month study of the locus of its cars and deisels and tried to project it over a whole year. On the basis of this study it claimed that the average proportionate value of cars and deisels on lines outside of Pennsylvania, were not subject to the capital stock tax. This contention was rejected by the Commonwealth.

The defendant contends: (1) that the Commonwealth may not tax the entire value of its deisels and cars, because some were out of the State part of the year on a car day basis; (2) that the act does not authorize taxing the entire value thereof, and (3) that so construed, the act offends against the State and Federal Constitutions.

On the contrary, the Commonwealth contends that it may tax the entire value of the deisels and cars because they had not acquired an actual situs elsewhere.

The tax here involved was imposed under Sections 20 and 21 of the Act of 1889, P. L. 420, as amended, 72 P. S. 1871. The tax has universally been held to be a property tax.

Originally, tangible personal property was taxable at the domicile of the owner. This rule has now been at least partially relaxed.

> "While the doctrine of *mobilia sequuntur personam* no longer applies to the tangibles, these, like land, having their tax situs in the jurisdiction in which they are physically located . . . in the case of intangibles the ancient doctrine still remains . . ." Com. v. Stewart, 338 Pa. 9, 17.

However, Mr. Justice Bell, in the recent case of *Com. v. Universal Trades, Inc.*, not yet reported, stated:

> "The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a seagoing vessel, the property has no permanent situs anywhere."

Likewise, in *Greenough v. Tax Assessors*, 331 U. S. 486, 491, in discussing the rule, the court said:

> "And where the tangible property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles because the corporation exists under the law of its domicile."

See also *Woods v. Oklahoma Tax Commission*, 162 P. 2nd 875, 877.

In *New York Central Railroad v. Miller*, 202 U. S. 584 beginning at page 596, it is stated:

> "It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. . . . But it has not been decided, and it could not be decided that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or

six months, and then brought back . . . the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts."

The case of *Commonwealth v. American Dredging Company*, 122 Pa. 386, 391 involved a domestic corporation which owned four dredges, a tug boat and eleven scows which had been built outside of Pennsylvania and had never been within it. The court held these items of tangible property to be taxable in Pennsylvania:

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state . . . It follows that if not taxable here, it escapes altogether . . . Hence, their situs for taxation is the domicil of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

Another case in point is *Northwest Airlines v. Minnesota*, 322 U. S. 292. There the domiciliary State was allowed to tax the entire fleet. The Supreme Court stated:

> "The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is . . . (p. 297).
>
> "But no judicial restriction has been applied against the domiciliary State except when property . . . is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks." (p. 298).

It has been argued that the effect of these decisions has been modified by *Standard Oil Co. v. Peck*, 342 U.S. 382. We cannot agree with this contention. This case involved the taxation of barges operated by an Ohio corporation. These vessels were used to transport oil without the State. They stopped in the State only occasionally for fuel or repairs. They were almost continuously outside of the State. The Court stated:

> "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of domicile. . . . Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." (p. 384, 385).

It is, of course, apparent here that the domestic corporation was engaged in its own business while operating the barges at points outside the State and upon navigable waters. This is quite different from the activities of the defendant which did not use their deisels or cars outside of Pennsylvania in conducting its own business.

A case dealing with freight cars employed on a per diem basis was *Com. of Kentucky v. Union Pacific Railroad Company*, 283 S.W. 119. There the State of Kentucky attempted to impose a property tax upon freight cars owned by a foreign railroad but within the State of Kentucky on local roads. Kentucky also attempted to levy a franchise tax upon the foreign corporation. The court in effect held the cars had not acquired a situs for tax purposes in Kentucky and also that the foreign corporation was not engaged in business in Kentucky. We quote from the opinion as follows:

> "A railroad freight car, however, is primarily designed for the use of owning carrier on its own

line. It is not sent by its owner onto the line of another carrier in the prosecution of its owner's business, which is to carry freight on the line of such owner. It is sent onto the line of the connecting carrier for the convenience of the shipper, and because the United States Government requires railroads to do so in through routing. The tank line and like companies receive a substantial profit from the use of their cars when in the foreign states. . . . But the railroads do not send their cars into other states in the effort to make any profit from them while there. The foreign railroads are not doing business in such states as are the tank line and like companies." (p. 122).

"From what we have said, it results that these foreign owned railroad cars had no situs for taxation in Kentucky. . . . If this be so, it then follows that, as these foreign railroads owned no property and did no business within this state during any of these years, they are not liable for the franchise tax here sought to be imposed." (p. 123).

We think these cases amply demonstrate that the rolling stock of the defendant, a domestic corporation, is taxable here unless it has acquired a situs elsewhere. The defendant operates a railroad in Pennsylvania and in no other state. It pays no corporate taxes to any other State. The statistics compiled by the defendant on a car day basis fail to establish a tax situs elsewhere. Rolling stock may be meandering about the country without acquiring a tax situs in any State but that of its domicile. Furthermore, the statistics lend themselves to various interpretations, some of which could be adverse to the contentions of the defendant. We have been importuned to find that the defendant was doing business in other States by maintaining offices there. We do not deem this to be an issue in this case. The real crux is the tax situs of the rolling stock. It has

not been demonstrated, at least to our satisfaction, that any part of the defendant's rolling stock has acquired a tax situs outside of Pennsylvania. The apportionment policy is inapplicable, because the defendant does not operate an interstate railroad. This distinguishes the present case from barge, tankcar and pullman car cases where the corporation engaged in its own business in several States. Our conclusion is that the tax situs of all of the defendant's rolling stock is Pennsylvania.

Since the rolling stock had a tax situs here, there is no violation of due process. See *N.Y.C.R.R. v. Miller*, 202 U. S. 584. There is no lack of uniformity because an apportionment is allowed railroads operating in more than one State and not allowed the defendant. Indeed, apportionment is then necessary to avoid multiple taxation, and in any event it is a matter of classification.

> "The rule is well established that uniformity requires only that a basis of classification be reasonable."
>
> *Com. v. Firemans' Fund Ins. Co.*, 369 Pa. 560, 565.

Uniformity under the Pennsylvania Constitution is construed in pari materia with the equal protection clause of the Federal Constitution. *Com. v. Budd Co.*, 379 Pa. 159, 167. Hence, if there is no lack of uniformity, there is no lack of equal protection.

It is our view that the defendant is not engaged in interstate commerce. However, even if it were, its property permanently located here is taxable. *Com. v. Clyde Steamship Co.*, 268 Pa. 278, 282 (1st conclusion), affirmed per curiam. This disposes of the Commerce Clause.

The Commonwealth's requests for findings of fact

are affirmed. Heretofore in this opinion we have found the facts to be as set forth in the stipulation. This is in compliance with the request of the defendant for findings, except that we refused to eliminate paragraph 26 of the Stipulation.

All of the requests of the Commonwealth for Conclusions of Law are affirmed except No. 12, which is refused. Requests Nos. 1 and 2 of the defendant for Conclusions of Law are affirmed. All others are refused.

We make these additional

CONCLUSIONS OF LAW

1. The capital stock tax of the defendant for the year 1951 was properly settled in the amount of $97,271.63, all of which has been paid.

2. The appeal should be dismissed at the cost of the defendant.

X

JUDGMENT NISI

DECREE

And Now, to-wit: April 28, 1958, the appeal is dismissed. Judgment is hereby entered in favor of the Commonwealth and against the defendant in the amount of $97,271.63; this amount having been paid, the judgment shall be marked satisfied upon payment of the costs by the defendant, unless exceptions hereto be filed in accordance with law.

The Prothonotary shall advise the parties or their counsel of this decree forthwith.

s/ KARL E. RICHARDS
President Judge Orphans' Court.

XI

DEFENDANT'S EXCEPTIONS

And Now, this 26th day of May, 1958, Central Railroad Company of Pennsylvania, defendant in the above-entitled case, by its attorney, Roy J. Keefer, files the following exceptions to the Findings of Fact, Conclusions of Law, Opinion and Judgment Nisi of the Court entered on April 28, 1958; to the affirmation by the Trial Judge of certain of the Commonwealth's Requests for Findings of Fact; to the affirmation by the Trial Judge of the Commonwealth's Conclusions of Law; to the refusal of the Trial Judge to affirm Defendant's Requests for Conclusions of Law; and to overruling by the Trial Judge of Defendant's objection to the relevancy and materiality of the facts set forth in paragraph 26 of the Stipulation of Facts, the specific exceptions being as follows:

Exceptions to the Findings of Fact, Conclusions of Law, Opinion and Judgment Nisi of the Court

1. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "* * * CNJ was then reimbursed by the defendant for wages and salaries expended by it for work done for the defendant."

2. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "The defendant made a one month study of the locus of its cars and deisels and tried to project it over a whole year. On the basis of this study it claimed that the average proportionate value of cars and deisels on lines outside of Pennsylvania, were not subject to the capital stock tax. This contention was rejected by the Commonwealth."

3. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "The defendant contends: (1) that the Commonwealth may not tax the entire value of its deisels and cars, because some were out of the State part of the year on a car day basis; (2) that the act does not authorize taxing the entire value thereof; and (3) that so construed, the act offends against the State and Federal Constitutions."

4. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "It has been argued that the effect of these decisions has been modified by *Standard Oil Co. v. Peck*, 342 U. S. 382. We cannot agree with this contention. This case involved the taxation of barges operated by an Ohio corporation. These vessels were used to transport oil without the State. They stopped in the State only occasionally for fuel or repairs. They were almost continuously outside of the State. * * *
>
> * * * *
>
> "It is, of course, apparent here that the domestic corporation was engaged in its own business while operating the barges at points outside the State and upon navigable waters. This is quite different from the activities of the defendant which did not use their deisels or cars outside of Pennsylvania in conducting its own business."

5. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "* * * The statistics compiled by the defendant on a car day basis fail to establish a tax situs elsewhere. Rolling stock may be meandering about the country without acquiring a tax situs in any State but that of its domicile."

6. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "* * * We have been importuned to find that the defendant was doing business in other States by maintaining offices there. We do not deem this to be an issue in this case. * * *"

7. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "* * * The real crux is the tax situs of the rolling stock. It has not been demonstrated, at least to our satisfaction, that any part of the defendant's rolling stock has acquired a tax situs outside of Pennsylvania. The apportionment policy is inapplicable, because the defendant does not operate an interstate railroad. This distinguishes the present case from barge, tankcar and pullman car cases where the corporation engaged in its own business in several States. Our conclusion is that the tax situs of all of the defendant's rolling stock is Pennsylvania."

8. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "Since the rolling stock had a tax situs here, there is no violation of due process. See *N.Y.C.R.R. v. Miller*, 202 U. S. 584. There is no lack of uniformity because an apportionment is allowed railroads operating in more than one State and not allowed the defendant. Indeed, apportionment is then necessary to avoid multiple taxation, and in any event it is a matter of classification."

9. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "It is our view that the defendant is not engaged in interstate commerce. However, even if it were, its property permanently located here is taxable."

10. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "All of the requests of the Commonwealth for Conclusions of Law are affirmed * * *".

11. The learned Trial Judge erred in his First Conclusion of Law, which reads as follows:

> "1. The capital stock tax of the defendant for the year 1591 was properly settled in the amount of $97,271.63, all of which has been paid."

12. The learned Trial Judge erred in his Second Conclusion of Law, which reads as follows:

> "2. The appeal should be dismissed at the cost of the defendant."

13. The learned Trial Judge erred in entering the following judgment nisi:

> "DECREE
>
> "AND NOW, to-wit: April 28, 1958, the appeal is dismissed. Judgment is hereby entered in favor of the Commonwealth and against the defendant in the amount of $97,271.63; this amount having been paid, the judgment shall be marked satisfied upon payment of the costs by the defendant, unless exceptions hereto be filed in accordance with law.
>
> "The Prothonotary shall advise the parties or their counsel of this decree forthwith.
>
> "/s/ KARL E. RICHARDS
> "*President Judge Orphans' Court.*"

Exceptions to the Affirmation by the Trial Judge of Certain of the Commonwealth's Requests for Findings of Fact

14. Although the learned Trial Judge found the facts in the case at issue to be as set forth in the Stipulation of Facts, nevertheless, he erred in affirming the Commonwealth's 7th, 8th, 9th, 10th and 17th Requests for Findings of Fact which are incomplete and give rise to erroneous inferences.

Exceptions to the Affirmation by the Trial Judge of the Commonwealth's Requests for Conclusions of Law

15. The learned Trial Judge erred in affirming the Commonwealth's First Request for Conclusions of Law, which request was as follows:

> "1. Defendant is a Pennsylvania corporation which was engaged in Pennsylvania in the operation of a railroad during 1951, and was not engaged in the business of operating a railroad in any other state."

16. The learned Trial Judge erred in affirming the Commonwealth's Second Request for Conclusions of Law, which request was as follows:

> "2. Defendant's freight cars operated on tracks of other railroads outside Pennsylvania under per diem rental agreements did not thereby acquire any situs outside of Pennsylvania for taxation, and were therefore taxable in Pennsylvania, the domicile of defendant."

17. The learned Trial Judge erred in affirming the Commonwealth's Third Request for Conclusions of Law, which request was as follows:

"3. Defendant's Diesel locomotives used on tracks of CNJ, parent of the defendant, did not acquire tax situs in the State of New Jersey."

18. The learned Trial Judge erred in affirming the Commonwealth's Fourth Request for Conclusions of Law, which request was as follows:

"4. The taxing officers of the Commonwealth of Pennsylvania correctly refused to allocate outside of Pennsylvania either the defendant's freight cars used by other railroads subject to car hire, or its Diesel locomotives leased by CNJ."

19. The learned Trial Judge erred in affirming the Commonwealth's Fifth Request for Conclusions of Law, which request was as follows:

"5. Defendant has failed to show that any of its freight cars or Diesel locomotives became permanently located or acquired a tax situs in any state other than Pennsylvania during 1951."

20. The learned Trial Judge erred in affirming the Commonwealth's Sixth Request for Conclusions of Law, which request was as follows:

"6. Freight car hire for days of use on other railroads is not a valid test for determining either the location of a specific car or the tax situs of a specific car."

21. The learned Trial Judge erred in affirming the Commonwealth's Seventh Request for Conclusions of Law, which request was as follows:

"7. Since the defendant was not subject to capital stock or franchise taxes in any other state during 1951, an allocation of a portion of its freight cars or Diesel locomotives outside of Pennsylvania

was not necessary in order to avoid double taxation."

22. The learned Trial Judge erred in affirming the Commonwealth's Eighth Request for Conclusions of Law, which request was as follows:

> "8. While the defendant's freight cars and Diesel locomotives were being used by other railroads outside of Pennsylvania, such cars and locomotives were not being used in the business of the defendant, which is not in the business of operating a railroad outside of Pennsylvania, and while so used, defendant's freight cars and Diesel locomotives were under the sole operation and control of the hiring or lessee railroads, and were part of trains and equipment operated by the hiring or lessee railroads."

23. The Learned Trial Judge erred in affirming the Commonwealth's Ninth Request for Conclusions of Law, which request was as follows:

> "9. There was no lack of uniformity in the taxation of the defendant in the present case, because all railroads which received a track mileage allocation actually had tracks in other states, were doing business there, and paid franchise or property taxes there (S/F 25)."

24. The learned Trial Judge erred in affirming the Commonwealth's Tenth Request for Conclusions of Law, which request was as follows:

> "10. The lending or leasing of tangible personal property by the defendant, a Pennsylvania corporation, for temporary use in transit within or outside of Pennsylvania, does not constitute do-

ing business outside of Pennsylvania or the doing of an interstate railroad business; and even it it should be determined that the defendant is engaged in part in interstate commerce, its tangible personal property having a situs in Pennsylvania would be subject to the Pennsylvania Capital Stock Tax, a property tax, and such tax would not violate the Commerce Clause of the Constitution of the United States."

25. The learned Trial Judge erred in affirming the Commonwealth's Eleventh Request for Conclusions of Law, which request was as follows:

"11. The capital stock tax settlement made against the defendant for 1951 met all the requirements of due process, since all of defendant's rolling stock had its tax situs in Pennsylvania, and none of it was subject to taxation in, or actually taxed by, any other state."

26. The learned Trial Judge erred in affirming the Commonwealth's Thirteenth Request for Conclusions of Law, which request was as follows:

"13. The capital stock tax settlement made against the defendant for the year 1951 did not violate any provision of the Constitution of Pennsylvania or the Constitution of the United States."

27. The learned Trial Judge erred in affirming the Commonwealth's Fourteenth Request for Conclusions of Law, which request was as follows:

"14. Judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the amount of $97,271.63 which, having been paid, should be marked satisfied (S/F 27)."

Exceptions to the Failure and Refusal of the Trial Judge to Affirm Defendant's Requests for Conclusions of Law

28. The learned Trial Judge erred in refusing to affirm defendant's Third Request for Conclusions of Law, which request was as follows:

> "3. During the year 1951, Defendant maintained general offices outside of Pennsylvania at 143 Liberty Street, New York 6, New York; Jersey City and Elizabethport, New Jersey; and off-line freight offices at Albany, Buffalo, Boston, Cleveland, St. Louis, Chicago, Detroit, Newark and Long Branch (New Jersey)."

29. The learned Trial Judge erred in refusing to affirm Defendant's Fourth Request for Conclusions of Law, which request was as follows:

> "4. Certain general officers, subordinate officials and employees on the payroll of The Central Railroad Company of New Jersey served in a similar capacity, and rendered services, for the Defendant; and in so doing, the relationship between them and Defendant was that of employer and agent and/or employee; and for such services Defendant paid their wages and salaries which appear as such in Defendant's books of account."

30. The learned Trial Judge erred in refusing to affirm Defendant's Fifth Request for Conclusions of Law, which request was as follows:

> "5. During the year 1951, Defendant was engaged outside of Pennsylvania in transacting a substantial part of its business of 'maintaining and operating a railroad for public use in conveyance of persons and property'."

31. The learned Trial Judge erred in refusing to affirm Defendant's Sixth Request for Conclusions of Law, which request was as follows:

> "6. In the course of through freight shipments originating on its own lines in Pennsylvania or on the line of C.N.J. in New Jersey, Defendant's diesel locomotives and freight cars were run regularly, continuously and habitually on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of C.N.J. in New Jersey; and its diesel locomotives acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of mileage operated outside of Pennsylvania to total mileage operated; and its freight cars acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of car days on the lines of C.N.J. outside of Pennsylvania to total car days everywhere."

32. The learned Trial Judge erred in refusing to affirm Defendant's Seventh Request for Conclusions of Law, which request was as follows:

> "7. The flow of freight cars to and from Defendant with attendant benefits and liabilities, under the Car Service and Per Diem Agreement, constitutes a part of Defendant's business of maintaining and operating a railroad."

33. The learned Trial Judge erred in refusing to affirm Defendant's Eighth Request for Conclusions of Law, which request was as follows:

> "8. In the course of through freight shipments extending over the lines of other railroads and under the Car Service and Per Diem Agreement, Defendant's freight cars were regularly, habitually and/or continuously employed on the lines of

other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania; and acquired a situs outside of Pennsylvania for property tax purposes to the extent of the ratio of car days outside of Pennsylvania to total car days everywhere or to the extent of the ratio of gross car rentals outside of Pennsylvania to total gross car rentals everywhere."

34. The learned Trial Judge erred in refusing to affirm Defendant's Ninth Request for Conclusions of Law, which request was as follows:

> "9. An average number of Defendant's freight cars acquired a situs outside of Pennsylvania by reason of regular, habitual and continuous presence outside of Pennsylvania; and in the absence of determination of such average number based on direct proof, it is appropriate to make such determination based on car day or gross rental ratios within and without the State."

35. The learned Trial Judge erred in refusing to affirm Defendant's Tenth Request for Conclusions of Law, which request was as follows:

> "10. One Thousand and Twenty-four (1024) of Defendant's freight cars acquired a situs outside of Pennsylvania for property tax purposes on the basis of direct proof that such number was continuously outside of Pennsylvania throughout the entire year 1951."

36. The learned Trial Judge erred in refusing to affirm Defendant's Eleventh Request for Conclusions of Law, which request was as follows:

> "11. Other states have the power under Due Process of the Laws to impose property tax upon

the average number of Defendant's freight cars regularly, habitually and/or continuously present therein during the year 1951, regardless of Defendant's domicile and regardless of whether or not Defendant is doing business therein; and the existence of this power to tax, whether exercised or not, precludes Pennsylvania, the domiciliary State, from imposing property tax upon full value of *all* of Defendant's freight cars."

37. The learned Trial Judge erred in refusing to affirm Defendant's Twelfth Request for Conclusions of Law, which request was as follows:

"12. The capital stock tax settlement made against Defendant violates the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, because it is the intent of said Act not to authorize the imposition of the capital stock tax on Defendant's diesel locomotives and freight cars located or having a situs outside of the State."

38. The learned Trial Judge erred in refusing to affirm Defendant's Thirteenth Request for Conclusions of Law, which request was as follows:

"13. The capital stock tax settlement made against Defendant violates the due process of the laws provisions of Section 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States because therein the capital stock tax, which is a property tax, is imposed upon Defendant's diesel locomotives and freight cars located or having a situs outside of the State and as to which the laws of Pennsylvania did not afford protection, opportunities and benefits throughout the year 1951."

39. The learned Trial Judge erred in refusing to affirm Defendant's Fourteenth Request for Conclusions of Law, which request was as follows:

> "14. The capital stock tax settlement made against Defendant violates the Commerce Clause (Section 8, Clause 3 of Article I) of the Constitution of the United States in that the taxation by Pennsylvania of the entire value, or all, of Defendant's diesel locomotives and freight cars under the facts in the case constitutes, or exposes Defendant to, multiple taxation of interstate operations and such taxation has no relation to the opportunities, benefits or protection which Pennsylvania, the taxing state, gives those operations."

40. The learned Trial Judge erred in refusing to affirm Defendant's Fifteenth Request for Conclusions of Law, which request was as follows:

> "15. The capital stock tax settlement made against Defendant violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the entire value, or all, of the diesel locomotives and freight cars or similar property of other corporations, domiciliary to Pennsylvania, which are in the same class as Defendant, is not subjected to capital stock tax under similar circumstances as in the case of Defendant."

41. The learned Trial Judge erred in refusing to affirm Defendant's Sixteenth Request for Conclusions of Law, which request was as follows:

> "16. Certain facts agreed upon by counsel for the respective parties, contained in Paragraph

Twenty-Six (26) of the Stipulation of Facts and objected to therein by counsel for Defendant as being irrelevant and immaterial, should be excluded from the evidence considered by the Court because they relate to The Central Railroad Company of New Jersey and have no bearing or application in the determination of Defendant's liability to, or exemption from, capital stock tax for 1951."

42. The learned Trial Judge erred in refusing to affirm Defendant's Seventeenth Request for Conclusions of Law, which request was as follows:

"17. The Board of Finance and Revenue erred in making the following decision:

"And now, to-wit October 20, 1954,

"This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of the Auditor General, is hereby sustained."

43. The learned Trial Judge erred in refusing to affirm Defendant's Eighteenth Request for Conclusions of Law, which request was as follows:

"18. The appeal is sustained at the cost of the Commonwealth."

44. The learned Trial Judge erred in refusing to affirm Defendant's Nineteenth Request for Conclusions of Law, which request was as follows:

"19. Judgment should be entered in favor of the Commonwealth and against the Defendant in the amount of Sixty-Two Thousand Seven Hundred Fifty Dollars and Seventy Cents ($62,750.70), computed pursuant to Paragraph 28 of the Stipulation of Facts, which, having been overpaid, should be

marked satisfied, and said judgment should order a credit of Thirty-Four Thousand Five Hundred Twenty Dollars and Ninety-four Cents ($34,520.-94) to be entered in favor of Defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General."

Exceptions to the Overruling by the Trial Judge of Defendant's Objection to the Relevancy and Materiality of the Facts Contained in Paragraph 26 of the Stipulation of Facts

45. The learned Trial Judge erred in overruling Defendant's objection to the relevancy and materiality of the facts contained in Paragraph 26 of the Stipulation of Facts, which objection was as follows:

"Defendant objects to the materiality and relevancy of the facts set forth in this paragraph."

Respectfully submitted,

/s/ ROY J. KEEFER

ROY J. KEEFER
Attorney for Defendant.

XII

OPINION ON EXCEPTIONS

BY THE COURT:

The defendant has filed forty-five exceptions to the various determinations we made in our opinion of April 28, 1958. That opinion dealt with and considered every point raised by the exceptions, and nothing has been shown to convince us of any error therein. We see no virtue in needlessly repeating what we there said.

The exceptant has called our attention to *Flying Tiger Line, Inc. v. City of Los Angeles*, 333 Pac. Rep. 2d 323, decided by the Supreme Court of California. In this case a certiorari had been filed with the Supreme Court of the United States at the time of argument on the exceptions. We have since been advised that certiorari has been denied. However, we do not consider that case to be in point, for the reason that the Flying Tiger Line, Inc., was engaged in interstate and foreign commerce, whereas the defendant was engaged solely in domestic or intrastate commerce.

XIII

FINAL JUDGMENT

FINAL DECREE

And now, to-wit: July 9, 1959, each of the forty-five exceptions is dismissed. Judgment shall be entered as directed by the decree *nisi*.

s/ Karl E. Richards,
President Judge Orphans' Court.

XIV

STIPULATION CONCERNING THE RECORD

And now, April 15, 1960, Counsel for Central Railroad Company of Pennsylvania, Appellant, and Counsel for the Commonwealth of Pennsylvania, Appellee, agree that the foregoing shall constitute the entire printed Record in this case on appeal to the Supreme Court of Pennsylvania entered at No. 24 May Term, 1960.

/s/ George W. Keitel,
Counsel for Appellee.

/s/ Roy J. Keefer,
Counsel for Appellant.

[fol. 207]

IN SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 24 May Term, 1960

COMMONWEALTH OF PENNSYLVANIA,

v.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, Appellant.

DOCKET ENTRIES

Sept. 16, 1959	Appeal and affidavit filed.
Sept. 16, 1959	Certiorari exit, returnable the fourth Monday of May, 1960.
Sept. 22, 1959	Appearance for appellee, filed.

[fol. 208]

Apr. 12, 1960	Petition of appellant for continuance, with consent of appellee, filed.

ORDER

Apr. 14, 1960	Argument continued to the September, 1960 Session at Pittsburgh. By the Court, Jones, Chief Justice
Sept. 15, 1960	Record filed.
Oct. 3, 1960	Argued.

DECISION

Apr. 17, 1961	Judgment as modified is affirmed. Cohen, J.
Apr. 28, 1961	Record remitted to Court below.
May 17, 1961	Petition of appellant for reargument, filed.

[fol. 209]

May 17, 1961 Petition of appellant to court to consider its petition for reargument, filed.

Before Jones, C.J., and Bell, B. R. Jones, Cohen, Bok and Eagen, JJ.

ORDER

May 25, 1961 Petition for Reargument denied. Per Curiam

Before Jones, C.J., and Bell, B. R. Jones, Cohen, Bok and Eagen, JJ.

ORDER

May 25, 1961 [fol. 210] It is hereby ordered that the within petition for reargument be filed with the same effect as if it had been filed within the period prescribed by rule of this court. Per Curiam

June 21, 1961 Petition of appellant for supplemental certiorari filed.

ORDER

June 23, 1961 Petition granted. By the Court, Jones, Chief Justice

June 26, 1961 Supplemental Certiorari exit, returnable forthwith.

July 7, 1961 Record filed.

July 14, 1961 Notice of appeal to the Supreme Court of the United States, filed.

[fol. 211]

Aug. 21, 1961 Record certified to the Supreme Court of the United States.

Attorney for Appellant:
Roy J. Keefer

Attorneys for Appellee:
George W. Keitel, Deputy Attorney General; Anne X. Alpern, Attorney General.

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 24 May Term, 1960

COMMONWEALTH OF PENNSYLVANIA, Appellee,

v.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, Appellant.

Appeal from Judgment of the Court of Common Pleas of Dauphin County at No. 274 Commonwealth Docket, 1954.

OPINION OF THE COURT* — Filed April 17, 1961

COHEN, J.

This is an appeal from the decision of the Court of Common Pleas of Dauphin County sustaining the action of the Board of Finance and Review in refusing appellant's petition for resettlement of its capital stock tax. Act of 1889, P.L. 420, §§20, 21, as amended, 72 P.S. §§1871, 1901, 1902, for the year 1951.

Appellant, Central Railroad Company of Pennsylvania, a domestic corporation, operates a railroad, the tracks of which are solely within Pennsylvania. Appellant interchanges freight cars with connecting carriers as required by the Interstate Commerce Act of 1920, as amended, 49 USCA §1, pars. 9-14 (1959), thereby promoting the rapid and efficient through movement of freight in contrast to the prior burdensome practice of transferring freight from cars of one railroad to the cars of another. Under the current "car service and per diem agreement" entered into by appellant and all other members of the Association of American Railroads, the owning railroad is paid a per diem

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* As modified by letter of the Prothonotary of The Supreme Court of Pennsylvania dated May 16, 1961.

rate of $1.75 for its freight cars while on the lines of other railroads.

[fol. 213] Appellant also interchanges freight cars and diesel locomotives pursuant to an "operating agreement" with the Central Railroad Company of New Jersey, a New Jersey corporation which has no trackage in Pennsylvania. Appellant and the Central Railroad of New Jersey run regularly scheduled trains between Pennsylvania and New Jersey.

In its capital stock report for 1951, appellant claimed that an average proportionate value of its diesel locomotives and freight cars which were employed on lines of other railroads outside of Pennsylvania were not subject to the capital stock tax. The settlement of appellant's tax did not allow such claim. Resettlement and review of the settlement were refused and an appeal to the Court of Common Pleas of Dauphin County followed.

The case was tried without a jury and most of the facts were contained in a stipulation. Thereafter the case was argued before the court *en banc* which entered a judgment *nisi*. The appellant filed exceptions which, on final judgment, were overruled by the court. This appeal followed.

Appellant maintains that the commerce clause of the Federal Constitution and the due process of the laws provision of the Federal and Pennsylvania Constitutions are violated by the unapportioned capital stock tax imposed on appellant's diesel locomotives and freight cars. The tax as settled against appellant is similarly attacked as violating uniformity of taxation and equal protection of the laws.

The Pennsylvania Capital Stock Tax is a tax upon the actual value of the capital stock of a domestic corporation [fol. 214] as represented by its property and assets: *Commonwealth* v. *Southern Pennsylvania Bus Company*, 339 Pa. 521, 15 A.2d 375 (1940). Since the Commonwealth does not have power to tax tangible property located beyond its jurisdiction, so much of the value of the capital stock as is represented by such property is exempt from the tax: *Delaware, Lackawanna and Western Railroad Company* v. *Pennsylvania*, 198 U.S. 341 (1905). Thus, we must ascertain whether Pennsylvania has jurisdiction to impose an unapportioned tax on all of appellant's rolling stock.

Although the commerce clause has long been considered to be a limitation upon the power of the states to tax an instrumentality of commerce, the law has evolved to a point where the states are not unduly restrained by that doctrine in their efforts to tax instrumentalities of commerce. As the United States Supreme Court recently stated in *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954): "While the question of whether a commodity on route to market is sufficiently settled in a state for purposes of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." 347 U.S. at 598, 599. And due process considerations do not necessarily prohibit the domiciliary state from taxing a corporation's personal property which is located outside the state. *See Curry* v. *Tax Assessors*, 331 U.S. 486, 491 (1946). Where, however, the particular property has a tax situs outside of the domiciliary state it would be a violation of due process for the domiciliary state to tax the property at full value since " . . . there would be multiple [fol. 215] taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations." *Standard Oil Company* v. *Peck*, 342 U.S. 382, 384, 385 (1952).

The crucial issue for our determination therefore is whether any of appellant's freight cars and diesel locomotives obtained a tax situs outside this Commonwealth. In order to determine this issue we must review the cases which have considered the question of tax situs in respect to the rolling stock of railroads, vessels of shiplines and, most recently, the flight equipment of airlines.

The continuous and constant use of a portion of a railroad's rolling stock in a non-domiciliary state has been upheld as constituting a tax situs for that portion. In *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U.S. 18 (1891), Pennsylvania was permitted to impose its capital stock tax on pullman cars traveling on fixed routes and schedules within this jurisdiction. The tax was apportioned

on the basis of a mileage traveled or operated ratio. There the court stated that although particular cars may not remain within the state, " . . . the Company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property. . . . "

Similarly in *American Refrigerator Transit Co.* v. *Hall*, 174 U.S. 70 (1899), the court sustained a Colorado property tax against an Illinois corporation which leased refrigerator cars to shippers and carriers throughout the nation. The average number of cars "permanently located" within Colorado was held subject to the tax.

[fol. 216] In *Union Refrigerator Transit Co.* v. *Lynch*, 177 U.S. 149 (1900), the Supreme Court sustained a Utah property tax on an average number of refrigerator cars determined under facts similar to those in *American Refrigerator Transit Co.* v. *Hall*, *supra*.

The Supreme Court first ruled on the power of the domiciliary state to tax the full value of rolling stock in the case of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905). There Kentucky, the domiciliary state, attempted to levy personal property taxes on the rolling stock (refrigerator cars) of the Union Refrigerator Transit Company. During the years involved, the cars were rented to shippers who took possession of the cars in *Wisconsin* and used them in Canada and Mexico as well as throughout the United States. The court held that Kentucky could not tax the cars since they were "permanently located" in other states.[1]

New York Central Railroad & Hudson River Company v. *Miller*, 202 U.S. 584 (1906), similarly dealing with the taxing power of the domiciliary state, was decided the next year. There the railroad was a domestic corporation owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing and rating and sending its cars to points

[1] Permanent absence of a particular piece of railroad rolling stock has never been a requisite for exemption from taxation by the domiciliary state. See Note 5 in the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines* v. *Minnesota*, 322 U.S. 292 (1944), for a discussion of this issue.

without as well as within the state, and over other lines as well as its own. By the familiar course of railroad business a considerable proportion of the taxpayer's cars were constantly out of the state, and upon this ground the taxpayer contended that the proportion should be deducted [fol. 217] from its entire capital, in order to find the capital stock employed within the state. In deciding that New York could tax all of the railroad's property at full value the court stated, " . . . [in] the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. . . . "[*] 202 U.S. at 597, 598.

The rules of law to be extracted from the aforementioned railroad cases are, in our opinion, determinative of the issues before this court. Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state.

Both parties to this appeal nevertheless maintain that subsequent Supreme Court decisions have altered the above rules. We do not agree.

[fol. 218] In *Johnson Oil Refining Co.* v. *Oklahoma ex rel. Mitchell*, 290 U.S. 158 (1933) the court ruled that Oklahoma could not levy an unapportioned tax upon 100% of the

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[*] See *Commonwealth of Kentucky* v. *Union Pacific Railroad Company*, 214 Ky. 349, 283 S.W. 119 (1926), where the Supreme Court of Kentucky used comparable language when denying that Commonwealth the power to tax a non-domiciliary's freight cars which were running on the lines of a domestic railroad pursuant to an operating agreement. The Kentucky court distinguished the pullman, tank and refrigerator car cases on the issue of substantial profit received by the tank line and like companies for use of their cars when in a foreign state.

rolling stock of a refining company domiciled in Illinois. The *ratio decidendi* of the case was that the tank cars which made *regular* trips from the taxpayer's Oklahoma refineries to out-of-state purchasers acquired a proportionate tax situs in each state through which it passed on such trips. The *Johnson* case, *supra*, is in accord with the prior tank and refrigerator car cases and does not alter the holding in *New York Central Railroad & Hudson River Company* v. *Miller*, *supra*, in respect to the tax situs of freight cars which are freely and irregularly interchanged by cooperating railroads.

The more recent Supreme Court decisions deal with instrumentalities of commerce other than railroad cars.

In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), the Supreme Court departed from the traditional view that a vessel could be taxed only by the state of domicile and upheld the power of Louisiana to tax "an average portion of property of a foreign corporation operating an interstate barge line, permanently within the state." Shortly thereafter in *Standard Oil Co.* v. *Peck*, *supra*, the Supreme Court reconsidered the power of the domiciliary state to tax vessels at full value. There the tug boats and barges of an Ohio corporation were used on the Ohio and Mississippi Rivers where they moved regularly to and from Ohio and other points on the two rivers. Only a small part of the transportation was on waters within or bordering Ohio. The court found that, although [fol. 219] no one vessel was continuously in another state during the taxable year, the boats and barges "were almost continuously outside of Ohio during the taxable year." The court denied the power of Ohio, the domiciliary state, to levy an unapportioned property tax on all of the boats and barges. It ruled that other states under *Ott* v. *Mississippi Valley Barge Line Co.*, *supra*, had the power to levy an apportioned tax on the vessels and that the existence of this power, whether exercised or not, precluded property taxation on all of the property by the domiciliary state.

The Supreme Court first considered property taxation of airlines in 1944. In *Northwest Airlines* v. *Minnesota*, 322 U.S. 292 (1944), the Supreme Court sustained a property tax assessed by Minnesota, the domiciliary state upon

the entire value of a fleet of planes which were operated on regular routes and fixed schedules in Minnesota and seven of the Northwestern states. This case, heavily relied upon by the court below and the Commonwealth, must, however, be read in light of two subsequent decisions. In *Standard Oil Co. v. Peck*, *supra* (1952), the court denied the power of the domiciliary state to tax the entire value of the boats and barges which were subject to apportioned property taxes by other states. And, when confronted with the power of a non-domiciliary state to assess a proportional property tax on the flight equipment of an airline, the Supreme Court in *Braniff Airways v. Nebraska Board of Equalization and Assessment*, supra (1954), all but nullified the ruling in the *Northwest* case.

[fol. 220] In *Braniff*, *supra*, the court sustained an apportioned personal property tax imposed by Nebraska, a non-domiciliary state, on the flight equipment of scheduled airlines. Braniff Airlines, Inc., the taxpayer in that case, made eighteen regular stops a day in Nebraska, rented ground facilities in that state and received one-tenth of its revenue from its Nebraska operations. The *Northwest* case, *supra*, was distinguished in *Braniff* on the ground that in *Northwest* there was no showing that the property had acquired a tax situs in states other than the domiciliary.

Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings have changed the standards established for the taxation of railroad rolling stock.

Under those standards the diesel locomotives of the Central Railroad Company of Pennsylvania which continuously travel on fixed routes and schedules to and from New Jersey pursuant to the operating agreement with the Central Railroad of New Jersey have obtained a tax situs in New Jersey and thus cannot be taxed for full value by this Commonwealth. Appellant's railroad freight cars (including those which may travel on the lines of the Central Railroad of New Jersey), which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would

enable other states, in accordance with due process, to tax them. Since the freight cars used pursuant to the car service and per diem agreement of the Association of [fol. 221] American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value.

Appellant, in addition, contends that the tax as settled against it violated uniformity of taxation and equal protection of the law. The essence of this argument is that other domestic railroad corporations whose tracks extend beyond this state were subjected to an apportioned capital stock tax settlement (based upon the percentage of total trackage in Pennsylvania) which included a proportion of their freight cars operating on the lines of other railroads outside of Pennsylvania, while appellant receives no exemption on its cars operating without the state on the lines of other railroads. This argument is devoid of merit since the classification was clearly reasonable. See *Commonwealth* v. *Fireman's Fund Ins. Company*, 369 Pa. 560, 565, 87 A.2d 255 (1952).

Apportionment of railroad rolling stock based upon track mileage has been held to be a valid taxing standard where the lines of a domiciliary railroad corporation extend beyond the border of that state. See *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940). Appellant obviously could not qualify for such apportionment since it does not have tracks without the state. The Commonwealth was clearly justified when it included freight cars on the lines of other railroads in the proportionate exemption from the capital stock tax of railroads that had tracks without as well as within Pennsylvania. Under the track mileage apportionment standard and the aforementioned tax situs [fol. 222] rules for freight cars, such freight cars acquired a tax situs only in those states in which the tracks of the railroad were situated and this tax situs was based solely on the percentage of trackage in the particular state. That method of taxation is perfectly consistent with our holding in this case.

Judgment as modified is affirmed.

[fol. 224]

IN THE SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION OF APPELLANT TO COURT TO CONSIDER ITS PETITION FOR REARGUMENT AND ORDER THEREON

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, petitions your Honorable Court to consider its Petition for Reargument, being filed concurrently herewith, and to take action thereon either granting reargument or denying the said Petition for Reargument for the following reasons:

1. The Petition for Reargument is being filed within thirty (30) days of the entry of the Court's Opinion and Judgment on April 17, 1961.

2. Appellant desires to take an appeal to the Supreme Court of the United States to review said Opinion and Judgment and to comply with requirements to do so.

[fol. 225] 3. Rule 11(3) of the Supreme Court of the United States provides:

> "1. An appeal [to review the judgment of a state court of last resort] in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal [within ninety days after the entry of said judgment]

4. Appellant believes that Rule 15(1)(b)(ii) of the Supreme Court of the United States relating in part to the content of the Jurisdictional Statement to be filed with that Court contemplates as a condition precedent to the taking of an appeal to the Supreme Court of the United States by the appellant in the instant case that a Petition for Reargument shall be filed with and action on the merits thereof shall be taken by, the Supreme Court of Pennsylvania. This Rule provides:

"(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, *the date of any order respecting a rehearing*, the date the notice of appeal was filed, and the court in which it was filed." (Emphasis supplied.)

Wherefore, appellant prays your Honorable Court to consider its Petition for Reargument and to take action on the merits thereof.

Respectfully submitted,

Roy J. Keefer, Attorney for Appellant.

[fol. 225a] Before Jones, C.J., and Bell, B. R. Jones, Cohen, Bok and Eagen, JJ.

ORDER

May 25, 1961, it is hereby ordered that the within petition for reargument be filed with the same effect as if it had been filed within the period prescribed by rule of this court.

Per Curiam

[fol. 226]

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

[Title omitted]

APPELLANT'S PETITION FOR REARGUMENT AND ORDER THEREON

Roy J. Keefer,
Hull, Leiby and Metzger,
Counsel for Appellant.

208-210 Walnut Street
Harrisburg, Pennsylvania

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[fol. 230] [Title omitted]

APPELLANT'S PETITION FOR REARGUMENT

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

The petition of Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, respectfully requests your Honorable Court to grant to it a reargument for the reasons set forth below. The judgment of the lower court, *as modified*, was affirmed by this Court on April 17, 1961.

The modification required apportionment of diesel locomotives run on fixed routes and regular schedules in and out of Pennsylvania. The lower court was affirmed: (1) in denying apportionment for freight cars run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of Central Railroad Company of New Jersey (CNJ) in New Jersey; (2) in denying apportionment for *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental; and (3) in holding that the tax settlement did not discriminate against appellant. This petition relates only to the affirmance.

[fol. 231] Appellant's reasons for Reargument are that the Court erred: (1) in denying apportionment for appellant's freight cars run on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey; (2) in relying upon the rule in the case of *New York Central Railroad & Hudson River Company*, 202 U. S. 584, in denying apportionment of *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental agreement; (3) in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require apportionment of, appellant's *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental agreement; and (4) in holding that the capital stock tax settlement did not discriminate against appellant.

I. Appellant's freight cars run on fixed routes and regular schedules in and out of Pennsylvania must be apportioned for property tax purposes.

Appellant's diesel locomotives and *some* of its freight cars were run on fixed routes and regular schedules over the lines of appellant in Pennsylvania and over the lines of CNJ in New Jersey under the *same* Operating Agreement between the parties (Stipulation of Facts, par. 14, R. 50a; and Exhibit A attached thereto, R. 58a-65a). The only difference between locomotives and freight cars is the basis of compensation to appellant while on the lines of CNJ in New Jersey: for locomotives, a mileage rate; and, for freight cars, a per diem rental. Insofar as appellant's freight cars were run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of CNJ in New Jersey, they were used under the Operating Agreement *and not* under the Car Service and Per Diem Agreement. The compensation to appellant was rental at the same rate as provided under the latter agreement. [fol. 232] This Court has held that the diesel locomotives so used must be apportioned. Appellant submits that the same facts, circumstances and legal principles require apportionment of its freight cars similarly used.

The parties have agreed and stipulated that appellant owned 3,074 freight cars, having an aggregate average net book value of $10,225,769, or an average net book value per car of $3,326.52 (S/F, par. 16, Exhibits Y-2 and Z, R. 51a, 131a, 145a); that appellant's freight cars run on fixed routes and regular schedules were on the lines of CNJ 57,689 car days out of total car days of 1,122,010 (S/F, par. 14, Exhibits Y-2 and Y-5, R. 50a, 131a, 134a).

On the basis of these stipulations, the apportionment of the average value and average number of appellant's freight cars to the lines of CNJ outside of Pennsylvania for 1951 is determined as follows:

$$\frac{57{,}689}{1{,}122{,}010} \times \$10{,}225{,}769 = \$525{,}765.71 \text{ average value}$$

divided by $3,326.53 = 158 average number.

See page 11 of appellant's brief.

Therefore, appellant submits that an average of 158 freight cars having an average net book value of $525,765.71 must be apportioned outside of Pennsylvania for 1951 for capital stock tax purposes; and that this Court erred in not so holding.

[fol. 233]

II. The Court erred in relying upon the rule in *New York Central Railroad & Hudson River Company*, 202 U. S. 584, in denying apportionment of *other* freight cars of appellant while on the lines of *other* railroads outside of Pennsylvania under the Car Service and Per Diem Agreement.

Three principal reasons support this proposition:

First, this Court, in the *Miller* case, relied principally upon the property tax rule applicable to vessels operating on the high seas, to wit, that "the state of origin remained the situs of the property, notwithstanding its occasional excursions to foreign ports", citing *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409 (1906). This meant that the property was taxable by the domicile unless the property had acquired a situs elsewhere by remaining beyond the domicile's borders for the *whole* tax period. This rule was rejected in its application to boats, barges and vessels operating on *inland* waters;[1] and had been rejected prior thereto in the property taxation of other types of equipment used in interstate transportation on land, such as Pullman and tank cars.[2] Therefore, the rule was not applicable to railroad equipment.

Second, this Court, in the *Miller* case, distinguished the *Pullman* case on the ground that the average unit property

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[1] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

[2] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).
American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599 (1899).
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905).

taxation apportionment rule in that case was based upon an average number of the *same* cars and not upon an average number of *constantly changing* cars; but, since the *Miller* case, the rule has been recognized as applicable or extended to an average number of constantly changing cars [fol. 234] or units of equipment receiving protection under the laws of the taxing state.[1] Had the extended rule been recognized at that time, the result in *Miller* might have been different, and, therefore, the *Miller* decision is not controlling in the instant case.

Third, the fact of "continuity and regularity" of movement to and from the domiciliary state which was absent or lacking in the *Miller* case is present in the instant case. Here, the parties have stipulated and agreed that, under the Car Service and Per Diem Agreement, appellant's "freight cars were *regularly, habitually* and or *continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania" (8 F. par. 15, R. 50, 51a). It is this fact of regular, habitual and continuous movement of transportation equipment to and from the domiciliary state or the taxing state which establishes, and requires the use by the domiciliary or other state of, the average unit property taxation rule of apportionment regardless of whether the average units of transportation equipment are run on fixed routes and regular schedules.[2]

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[1] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

Standard Oil Co. v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

Oklahoma Tax Commission v. *American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (1959).

[2] *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 18, 11 S. Ct. 76 (1891).

Braniff Airways Inc. v. *Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

or not." See also dissenting opinion of Mr. Chief Justice [fol. 235] Stone in *Northwest Airlines Inc.* v. *Minnesota*, 322 U. S. 292 (1944), pp. 321-325 and note 5 at pp. 324 and 325.

The existence of the fact of regular, habitual and continuous movement to and from the domiciliary state establishes *absence* from the opportunities, protection and benefits afforded by the laws of the domiciliary state, *thereby precluding* the domiciliary state from imposing a property tax upon the full value of the transportation equipment—*Union Refrigerator Transit Co.* v. *Kentucky*, *Peck* and *Flying Tiger* cases.

Therefore, it is submitted, on the basis of these three reasons, that the rule of the *Miller* case is not controlling in the instant case.

III. The Court erred in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require, apportionment of appellant's other freight cars while on the lines of other railroads outside of Pennsylvania under a per diem rental agreement.

There is involved here the highly important issue whether there is a limitation on the constitutional power of the

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American Refrigerator Transit Co. v. *Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899).

Union Refrigerator Transit Co. v. *Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900).

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

Johnson Oil Co. v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

Standard Oil Co. v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Line Inc. v. *County of Los Angeles* (Cal.), 333 P. 2d 323 (1958) cert. den. 359 U. S. 1001.

Oklahoma Tax Commission v. *American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (December 22, 1959).

domiciliary state under due process and the Commerce Clause to levy an *unapportioned* property tax on appellant's freight cars operated under the Car Service and Per Diem Agreement.

In order to prove appellant's proposition stated above, we beg the Court's indulgence to summarize the applicable facts, to discuss the principles established in the decisions and to apply them to the facts in the instant case. These will establish the Court's error.

[fol. 236] *(a) The Facts.*

Appellant's fleet of freight cars numbered 3,074 which developed total car days of 1,122,010 (S/F, par. 15 and Exhibits Y-2–Y-5, R. 50a, R. 131a-R. 143a).

The parties have stipulated as a fact of Record (S/F, par. 15, R. 50a) as follows:

> "Under the said Car Service and Per Diem Agreement, defendant's freight cars were *regularly, habitually and/or continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania." (Emphasis supplied)

From Exhibits Y-2 to Y-6, inclusive (R. 131a-R. 144a), the following is developed:

Total Car-Days			1,122,010
Fixed Routes and Regular Schedules (Operating Agreement):			
Appellant's road in Pennsylvania (Y-2)		104,479	
Road of CNJ in New Jersey (Y-5)		57,689	
Car Days		162,168	162,168
Average cars: $\frac{162,168}{1,122,010} \times 3,074$ cars		= 444.29	
Total Car Days—Car Service and Per Diem Agreement			959,842
Regular, habitual and continuous employment on lines of other railroads:			
	Percentage	*Car Days*	
In Pennsylvania (Y-3, Y-4)	16.75%	160,776	
Out of Pennsylvania (Y-4, Y-5)	83.25%	799,066	959,842
Total Freight Cars—Car Service and Per Diem Agreement: 3,074 minus 444.29			= 2629.71
	Percentage	*Average Cars*	
Average cars—Pennsylvania			
$\frac{160,776}{959,842} \times 2629.71 =$	16.75	440.48	
Average cars—out of Pennsylvania			
$\frac{799,066}{959,842} \times 2629.71 =$	83.25	2189.23	

[fol. 237] For determination of the average number of appellant's freight cars on the lines of specific railroads outside of Pennsylvania, where the car days on an individual road exceed 4,000, see pages 39, 40 and 41 of appellant's brief.

(b) Discussion of Cases.

The fundamental principle that taxation and protection are correlatives has been adopted as the current due process constitutional test of a state's power to tax movable tangible property—that is, physical presence within the taxing state and the *extent* to which protection, opportunities and benefits are afforded to such property by the taxing state,[1] and this test is particularly applicable to transportation equipment used in interstate commerce. Concerning this test, the Court, in the *Ott* case said, at page 25:

> "* * * So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state."

The basic fact of *continuous, habitual* and *regular* movement of transportation equipment to and from the state of domicile, from and to other states, supports the taxing [fol. 238] power of the foreign state to levy an *apportioned* property tax[2] and denies the taxing power of the domiciliary

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[1] *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 385, 72 S. Ct. 309 (1952).

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36 (1905).

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246 (1940).

Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949).

[2] *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

American Refrigerator Transit Co. v. *Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899).

(Footnote continued on next page)

state to levy an unapportioned property tax.[8]

This basic fact is a stipulated fact of Record in the instant case (S. F. par. 15, R. 50a).

The existence of this basic fact gives to the foreign state the constitutional power under due process to determine the "permanent situs" of *an average number of units* (average unit rule) within the state by some reasonable apportionment ratio (time, miles, stops, business volume, car days, etc.) and to levy a property tax thereon (cases cited in note 7). The rationale of these cases establishing this principle and rule is well-stated in the *Johnson Oil Refining Co.* case (note 7) at page 162 as follows:

> [fol. 239] "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several states—the individual cars *constantly running in and out of each State*—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are con-

Union Refrigerator Transit Co. v. *Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900).

Johnson Oil Refining Co. v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

Braniff Airways Inc. v. *Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

Oklahoma Tax Commission v. *American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (1959).

Scandinavian Airlines System Inc. v. *County of Los Angeles*, 6 West's Cal. Reporter 694, 183 Advance California Appellate Reports 69 (1960).

[8] *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

Standard Oil Co. v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Lines Inc. v. *County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

> stantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." (Emphasis supplied)

The existence of the basic fact of continuous, habitual and regular movement of transportation equipment to and from the state of domicile denies to the domiciliary state the constitutional power under due process to levy a property tax upon the *full value* of *all units of transportation equipment so used* because in such case the tax would bear no relation to "opportunities, benefits or protection conferred or afforded by the taxing state" (absence from the domiciliary state)[9] and would violate the Commerce Clause because the tax on the full value imposed by the domiciliary state duplicates an apportioned property tax which foreign states have power to impose (whether exercised or not) upon the same equipment so used within their jurisdiction.[10]

The case of *Union Refrigerator Transit Co.* v. *Kentucky*, supra, establishes beyond any doubt that the limitation on the constitutional power of the domiciliary state is based [fol. 240] upon "continuous, regular and habitual" *absence* from the domiciliary state and it established beyond any doubt that an average number of units have obtained a "permanent situs" outside the domiciliary state without requiring proof that an average number of units have obtained such situs in a specific foreign state and that such foreign state has exercised its constitutional power to levy an apportioned property tax thereon. Mr. Chief Justice Stone in note 5 to his dissenting opinion in the *Northwest Airlines* case explains the *Union Refrigerator* case at pages 324, 325:

> "' ' ' In *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of

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[9] See case cited in note 8.

[10] *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952). Dissenting Opinion of Mr. Chief Justice Stone in *Northwest Airlines Inc.* v. *Minnesota*, 322 U. S. 292, 64 S. Ct. 950 (1944), pages 310, 312-317, 325.

domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident from its citation (p. 206) of *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, and *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, as cases involving property "permanently located" in the taxing states. Both cases involved rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211)."

[fol. 241] The undisputed ratio decidendi of the cases in note 8 is stated in *Scandinavian Airlines Systems Inc.* v. *County of Los Angeles* (1960)[11] at pages 701-2 as follows:

"The rationale of these cases *is not based on the necessity to avoid double taxation* but, rather on the recognition of the non-domiciliary state's right to fair compensation for the protection and benefits afforded

[11] 6 West's California Reporter 694, 183 Advance California Appellate Reports 69 (1960).

> the taxpayer. The power to tax flows from *presence* of the property in the taxing state and the concomitant privileges enjoyed by the owners while thus employed within the jurisdiction. It is the 'unfairness' of the original 'domicile' or 'permanent presence' doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different formulae. Thus, the *onus* of double taxation *falls* not on the jurisdiction levying a fairly apportioned tax but *upon the domiciliary jurisdiction which refuses to apportion its taxes on the basis of benefits and protections actually conferred*". (Emphasis supplied.)

Thus, the basic fact of "regular, habitual and continuous" movement of transportation equipment to and from the domiciliary state, from and to other states, whether running on fixed routes and regular schedules[12] or not[13] gives [fol. 242] to the foreign state the constitutional power under

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[12] *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

Braniff Airways Inc. v. *Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

Scandinavian Airlines System Inc. v. *County of Los Angeles*, 6 West's Cal. Reporter 694, 185 Advance Cal. Appellate Reports 69 (1960).

[13] *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899).

Union Refrigerator Transit Co. v. *Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900).

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

Johnson Oil Refining Co. v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

Standard Oil Co. v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Lines Inc. v. *County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

Oklahoma Tax Commission v. *American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (1959).

due process to determine the average number of units having a "permanent situs" within its borders on some reasonable basis of apportionment and to levy a property tax thereon; and the existence of the same basic fact requires the domiciliary state to determine the average number of units having a "permanent situs" beyond its borders by some reasonable basis of apportionment and limits its constitutional power under due process to levy a property tax upon only the average number of units within its jurisdiction.[14] In this latter situation, the taxpayer does not have the burden and is not required to prove the average number of units in other specific states.[15]

(c) The errors of the Court.

In rejecting appellant's claim for apportionment of its freight cars while on the lines of other railroads outside of Pennsylvania and in upholding the unapportioned property tax levied by Pennsylvania, the domiciliary state, upon the full value thereof, this Court said, at page 6 of its opinion:

> "* * * Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state."

and, at pages 9 and 10 of its opinion:

> "Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings

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[14] *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

Standard Oil Co. v. *Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Lines Inc. v. *County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

[15] Cases cited note 14.

SUPREME COURT U. S.

FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1960

NO.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellant, Central Railroad Company of Pennsylvania, appeals from the *portion* of the final judgment of the Supreme Court of Pennsylvania, affirming the judgment of the court below, which sustained the constitutionality of the

state tax statute as construed and applied in assessing capital stock tax (a property tax) against appellant for the year 1951; and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

The portion of the final judgment of the Supreme Court of Pennsylvania modifying the judgment of the court below required apportionment of diesel locomotives run on fixed routes and regular schedules in and out of Pennsylvania. The portion thereof affirming the judgment of the court below: (1) denied apportionment for freight cars run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of Central Railroad Company of New Jersey (CNJ) in New Jersey; (2) denied apportionment for *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental; and held that the tax settlement did not discriminate against appellant. This appeal relates only to the affirmance.

A. OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 403 Pa. 419, 169 A.(2d) 878 (April 17, 1961), and is printed in Appendix B hereto.

The opinions of the trial court, Common Pleas of Dauphin County, Pennsylvania, entering judgment *nisi* and overruling exceptions, are included at pages 180a-187a, 204a of the printed *Pennsylvania Supreme Court Record* (hereinafter referred to as "R") filed herewith.

B. JURISDICTION

The grounds on which the jurisdiction of this court is invoked are:

(1) This action by appellant, a Pennsylvania Corporation, was brought under the provisions of Section 1104 of the Fiscal Code of Pennsylvania, 72 Pennsylvania Purdon's

Statutes, § 1104, on the ground that the unapportioned capital stock tax (a property tax) assessed on its freight cars, both those run on fixed routes and regular schedules in and out of Pennsylvania and those run regularly, habitually and continuously on the lines of other railroads outside of Pennsylvania, violated the Due Process, the Commerce Clause, and the Equal Protection of the Laws provisions of the Constitution of the United States. A decision on these points was necessary to the determination of the case. The portion of the final judgment and decision of the Supreme Court of Pennsylvania, the highest state court in which a decision in the suit on these points could be had, were in favor of the statute's validity. Accordingly, this Court has jurisdiction upon appeal to review the judgment in question. *Standard Oil Company of California v. Johnson*, 316 U. S. 481; 86 L. Ed. 1611.

(ii) The judgment of the Supreme Court of Pennsylvania, review of which is sought by this appeal, was dated and filed on April 17, 1961, and was made final on May 25, 1961, by refusal by said Court of appellant's petition for reargument (Appendix C and D, pp. 34-54). Notice of Appeal to this Court was filed July 14, 1961 in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U. S. C. §§ 1257(2) and (3) and 2103.

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the portion of the judgment on appeal in this case:

Question 1.

(a) Freight Cars—Regular Routes and Schedules

Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968 (1940).

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876 (1891).

Braniff Airways Inc. v. Nebraska State Board, 347 U. S. 590, 74 S. Ct. 757 (1954).

(b) FREIGHT CARS—REGULAR, HABITUAL AND CONTINUOUS INTERSTATE MOVEMENT AND NON-DOMICILIARY ABSENCE

Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362, 60 S. Ct. 968 (1940).

Pullman's Palace Car Co. v. Pennsylvanic, 141 U. S. 18, 11 S. Ct. 876 (1891).

Braniff Airways Inc. v. Nebraska State Board, 347 U. S. 590, 74 S. Ct. 757 (1954).

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905).

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599 (1899).

Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 S. Ct. 631 (1900).

Johnson Oil Refining Co. v. Oklahoma et al., 290 U. S. 158, 54 S. Ct. 152 (1933).

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 69 S. Ct. 432 (1949).

Standard Oil Co. v. Peck, 342 U. S. 382, 72 S. Ct. 309 (1952).

Flying Tiger Lines, Inc. v. County of Los Angeles, (Calif.) 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

Scandinavian Airlines System, Inc. v. County of Los Angeles, Dist. Ct. of Appeals (2nd. App. Dist. Division 2), 6 West's California Reporter 694, 183 Adv. Cal. App. Reports 69 (1960): modified by S. Ct. of California (May 29, 1961).

Oklahoma Tax Commission v. American Refrigerator Transit Co., Sup. Ct. of Okla., 349 P. 2d 746 (12-22-59).

Question 2.

Morey v. Doud, 354 U. S. 457, 77 S. Ct. 1344 (1957).

Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609 (1899).

State Statute Involved

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended (72 Purdon's Statutes, Sections 1871, 1901, 1902).

C. QUESTIONS PRESENTED

1. Does the *unapportioned* capital stock tax (property tax) levy of Pennsylvania, the domiciliary state, on appellant's freight cars run under an operating agreement on fixed routes and regular schedules over railroad lines to and from the state and on *other* freight cars of appellant run habitually, regularly, and continuously on railroad lines to and from, or wholly outside, the domiciliary state, under a Car Service and Per Diem Agreement, violate the Commerce Clause and the Due Process of the laws provisions of the Federal Constitution?

2. Does the *unapportioned* capital stock tax settlement against appellant violate the equal protection of the laws provisions of the Federal Constitution when apportionment is denied to appellant, having no trackage outside the state, and is allowed to other railroads with tracking in and out of the state, for freight cars while on the lines of using railroads outside of Pennsylvania under a Car Service and Per Diem Agreement?

D. STATEMENT OF THE CASE

(1) The Statute; Nature of Tax; and Tax Formula.

Section 20 of the tax statute (Appendix A) requires Pennsylvania corporations and corporations organized un-

der the laws of any other state and doing business in and liable to taxation within this Commonwealth or having capital employed or used in this Commonwealth to make an annual report to the Department of Revenue on a form prescribed by that Department and to include therein, *inter alia*:

> "Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.
>
> "Sixth. A valuation and appraisal * * * of the capital stock of the said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made".

Section 21(a) imposes tax at the rate of five mills upon each dollar of the actual value of the whole capital stock of Pennsylvania Corporations as ascertained in the manner prescribed in the twentieth section; and Section 21(b) imposes a franchise tax based upon the capital stock value of foreign corporations (not at issue in the present case).

The nature of the tax is not in dispute. It has conclusively been held, without dissent, to be a tax on property and assets of Pennsylvania Corporations as represented by capital stock value.[1]

The Act of June 22, 1931, P. L. 685 (Appendix A) prescribes the formula to be used to exclude from the tax, exempt assets, such as United States securities and tangible property having a situs outside the state. The amount of such assets is deducted from total assets. The ratio of the remaining assets to total assets is then applied to the whole capital stock value.

In the instant case on appeal, there is involved the issue of exclusion of the following assets which appellant contends

[1] *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905); *Com. v. Union Shipbuilding Co.*, 271 Pa. 403, 114 A. 257 (1921).

had a situs outside of, or were substantially absent from, the domiciliary state and, therefore, were beyond its taxing power and jurisdiction.

$525,765.71—Average value of freight cars (158) run on fixed routes and regular schedules over the lines of CNJ outside of Penna. (S. F. Par. 14 and Exhibits Y-2 and Y-5, R. 50a, 131a, 134a).

$7,282,523.00—Average value of freight cars (218.23) run regularly, habitually and continuously on the lines of *other* railroads outside of Penna. (S. F. Pars. 13, 15, 16 and Exhibits Y-2, Y-3, Y-4, Y-5 and Z, R. 49a, 50a, 51a, 131a-143a, 145a).

(2) History of the Case.

Appellant, a Pennsylvania Corporation, was incorporated for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property" (S. F. Par. 2, R. 38a). All of its capital stock was owned by its parent company, The Central Railroad Company of New Jersey, a New Jersey Corporation, hereinafter referred to as CNJ (S. F. Par. 3, R. 38a).

The railroad operated by appellant extended from the anthracite region in Pennsylvania (Scranton and Wilkes-Barre) to the Pennsylvania-New Jersey border at Easton (Pa.) where it connected with the railroad lines operated by CNJ to Jersey City and points along the north Jersey Coast. Appellant's total mileage (owned and leased—all in Pa.) was 206.74 - 123.47 main line and 83.27 branch (S. F. Par. 4, R. 38a).

There are two separate and distinct types of leasing involved in the instant case, the one under the Operating Agreement between appellant and CNJ and the other under the Car Service and Per Diem Agreement of the Association of American Railroads.

(a) The Operating Agreement

Prior to August 5, 1946, CNJ operated its railroad lines in New Jersey and it operated, *also*, under lease or sub-leases the railroad lines from Penna.-N. J. border at Easton to the anthracite region in Pennsylvania. On August 5, 1946, appellant, with the consent of the Interstate Commerce Commission (ICC), terminated the lease and sub-leases to CNJ of the railroad lines in Pennsylvania and took over their operation and the parties (appellant and CNJ) entered into an operating agreement *in order to continue the existing through freight and passenger service over their respective lines.* This Agreement provided that each party "shall operate such through service" over their respective lines; that "each party shall furnish its fair share of locomotives and other equipment necessary to operate such service"; and that "whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and operated by such other party until returned to the former's lines" (S. F, Exhibit A, R. 58a-65a).

Pursuant to this agreement, appellant's diesel locomotives and freight cars, in the course of *through* freight shipments originating on its lines in Pennsylvania or on the lines of CNJ in New Jersey, were run *on fixed routes and regular schedules* in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ in New Jersey and, for such use, appellant received a division of freight revenues, a mileage rate for its locomotives and a per diem rental for its freight cars while on the lines of CNJ (S. F, Pars. 14 and 18 and Exhibit A, Sections 2 and 5, R. 50a, 52a, 60a). The mileage ratio of freight locomotives (30 units) was 56.5523% in Pennsylvania and 43.4477% outside of Pennsylvania; and this mileage ratio applied to the average value of appellant's freight locomotives results in an allocation of average value of $1,908,381 or 17 locomotives to Pennsylvania and $1,466,160 or 13 locomotives outside of

Pennsylvania (S/F, Par. 18, Exhibit Z, R. 52a, 145a). This apportionment was allowed in the portion of the judgment of the Supreme Court of Pennsylvania *modifying* the judgment of the Court below.

Appellant owned 3074 freight cars during 1951, having an average net book value of $10,225,769 or an average net book value per car of $3,326.53 (S/F, Par. 16, Exhibits Y-2 and Z, R. 51a, 131a, 145a). Total car days were 3074 times 365 days or 1,122,010 and appellant's freight cars were on the lines of CNJ *under the Operating Agreement* for 57,689 car days (S/F, Exhibits Y-2 and Y-5, R. 131a, 134a). The average number and value of cars thus run on the lines of CNJ are determined by the ratio $\frac{57,689 \times \$10,225,769}{1,122,010} =$ 525,765.71 average value divided by $3,326.53=158 average number. This apportionment was denied by the Supreme Court of Pennsylvania and is at issue in this appeal.

Appellant's office at Mauch Chunk, Pennsylvania was relatively insignificant. Under the said Operating Agreement, appellant maintained joint offices and had joint operating and administrative personnel with CNJ at Jersey City, New Jersey and New York City; there, its nine operating departments were located which conducted its railroad operations in Pennsylvania. (S/F, Pars. 7, 8, 9, 10, 11, Exhibits A, C to W inclusive, R. 40a-49a, R. 58a-65a, R. 67a-129a). It paid its share of unemployment insurance and railroad retirement contributions on wages and salaries of joint employees; and on the wages of its sole employees actually on its railroad lines, it made similar payments (S/F, Pars. 9, 12, R. 45a-48a, R. 49a).

Appellant is not qualified or authorized to do business in any state other than Pennsylvania; nor does it pay franchise or property or other taxes to states other than Pennsylvania except in respect to wages of joint employees referred to. (S/F, Par. 12, R. 49a).

(b) Car Service and Per Diem Agreement

The Interstate Commerce Act of 1920, as amended, 49 U.S.C.A. Section 1, Pars. 9-14, requires, *inter alia*, railroads to interchange freight and passenger cars in order to provide rapid and efficient through interstate movement of freight and passengers as compared with prior practice of transfer from cars of one railroad to the cars of another.

Appellant is a member of the "Association of American Railroads." Under a "Car Service and Per Diem Agreement" entered into by members of the association pursuant to said Act of 1920, the owning railroad is paid a per diem rate of $1.75 (S. F, Exhibit X, R. 130a) for its freight cars while on the lines of other subscribing railroad members and on the lines of non-subscribing railroads (S. F, Par. 13 and Exhibit X, R. 49a, 50a, 130a).

Under this Agreement, it is stipulated by the parties in the instant case that appellant's freight cars, leased to subscribing members, *were regularly, habitually and continuously employed* on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania (S. F, Pars. 13, 15 and Exhibits Y-2, Y-3, Y-4 and Y-5, R. 49a, 50a, 51a, 131a-153a). *This dominant and controlling stipulated fact has been overlooked and disregarded by the courts below (Commonwealth Pleas, Dauphin County and Supreme Court of Pennsylvania).* The car day ratio for the entire year 1951 (total car days 1,122,010) produces the following result:

Car Days	*Percentage*	*Location of Using Railroad*	*Average Value*	*Number of Units*
(1) 104,479	.0931	Appellant—Pa	952,186	286.24
(2) 57,689	.0514	CNJ—Out of Pa	525,768	158.00
(3) 25,321	.0225	Others—All Pa	230,986	69.47
(4) 386,582	.3445	Others—In and Out Pa	3,522,762	1,058.99
(4)(a) 135,455	.120725	In Pa	1,234,475	371.10
(4)(b) 251,077	.2238	Out Pa	2,288,520	687.98
(5) 547,989	.4884	Others—All out Pa	4,994,253	1,501.34
1,122,010	.9999		10,225,083	3,074.04

(1) Regular routes and fixed schedules.

(2) Regular routes and fixed schedules.

(3) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) (a) and (b) Breakdown of item (4).

(5) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

At issue, also, in the instant appeal is the denial by the Supreme Court of Pennsylvania of apportionment outside of Pennsylvania of average freight cars of 2189.30 (items 4 (b) and 5, average value $7,282,723) on lines of other railroads outside of Pennsylvania.

Appellant contended that the authorities and particularly those cases cited under Question 1 (a) (ante, pp. 3, 4) were unanimous in holding that an unapportioned property tax by Pennsylvania, the domiciliary state, on appellant's diesel locomotives and freight cars running on regular routes and fixed schedules to and from the domiciliary state violated the Due Process and Commerce Clause provisions of the Federal Constitutions.

It contended further, on the basis of authorities cited under Question 1 (b), (ante, p. 4), that the same provisions of the Federal Constitution were violated by Pennsylvania's unapportioned property tax on appellant's freight cars which ran regularly, habitually and continuously to and from, and outside, the domiciliary state, on the lines of other railroads under a per diem rental agreement.

The Supreme Court of Pennsylvania affirmed appellant's contention in respect to diesel locomotives and overruled the court below. It failed to distinguish between appellant's freight cars run on fixed routes and regular schedules and those that did not, probably because the compensation to appellant in both situations was a per diem rental. It overruled appellant's contentions in both situa-

tions on the ground that "freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and schedules, do not, although an average number may be present in another state, acquire a tax situs outside the domiciliary state" (post, p. 30); and in support thereof, it held that the decisions of the Supreme Court of the United States (cases cited under Question I (a) and (b), ante, pp. 3, 4) requiring apportionment, under similar circumstances, of other types of transportation equipment used in interstate commerce (pullman, refrigerator and tank cars; boats, barges and vessels; and airplanes) are not applicable to, and do not require apportionment of, railroad rolling stock (appellant's freight cars).

In respect to the second question at issue, appellant contended that denial of apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement and the allowance of such apportionment to other owning railroads discriminated against appellant. The Supreme Court of Pennsylvania overruled appellant's contention on the ground that Pennsylvania could make valid classification between appellant whose railroad trackage was wholly in Pennsylvania, and other owning railroads whose trackage extended beyond Pennsylvania's borders.

(3) How the Federal Questions Were Raised.

a. From the beginning of this litigation, appellant has challenged the unapportioned tax on its freight cars run on fixed routed and regular schedules under an Operating Agreement over the lines of CNJ in New Jersey and on its freight cars run regularly, habitually and continuously over the lines of other railroads outside of Pennsylvania under a per diem rental agreement as constituting a violation of the Due Process, Commerce Clause and Equal Protection of the laws provisions of the Federal Constitution. This position of appellant was specifically maintained as follows:

(i) In its Appeal and Specification of Objections filed in the Court of Common Pleas of Dauphin County, Paragraph 3(a), (b), (c)—(R. 6a, 7a).

(ii) In its Requests for Conclusions of Law Nos. 6, 8, 9, 11, 13, 14, 15 filed with the trial court (R. 175a-178a) which were refused (R. 187a).

(iii) In its exceptions Nos. 4, 5, 8, 9, 10, 11, 12, 16, 18-26, 31-34, 36, 38, 39, 40, 44 (R. 190a-196a, 198a-202a) which were *dismissed by the trial court* (R. 204a).

(iv) In its brief before the Supreme Court of Pennsylvania where the questions involved were stated as follows:

> "2. Does the unapportioned capital stock tax settlement on appellant's diesel locomotives and freight cars run on regular routes and fixed schedules over railroad lines outside of Pennsylvania and on other freight cars used habitually, regularly and continuously on railroad lines outside of Pennsylvania under a Per Diem Agreement, violate the Commerce Clause of the Federal Constitution and the due process of the laws provisions of the Federal and State Constitutions?
>
> "3. Does the capital stock tax settlement against appellant violate uniformity of taxation and equal protection of the laws when apportionment is denied to appellant, and is allowed to other railroads whose lines extend beyond the physical borders of the State, for freight cars while on the lines of using railroads outside of Pennsylvania under a Per Diem Agreement?

(v) In its Petition for Reargument filed in the Supreme Court of Pennsylvania, which was denied (post, pp. 36-54).

At each of the above stages of the litigation, the trial court and the Supreme Court of Pennsylvania reached conclusions of law adverse to appellant's contentions. The facts in this case were stipulated by agreement of the parties (R. 38a-158a) but both state courts were guilty of gross negligence in disregarding the dominant, controlling fact as stated in Paragraph 15 thereof (S. F. Par. 15, R. 50a, 51a) to

the effect that appellant's "freight cars were regularly, habitually and or continuously employed on the lines of other railroads operating wholly in Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania."

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellant's railroad lines lie wholly within the Commonwealth of Pennsylvania but they connect at Easton, Pennsylvania and Phillipsburg, New Jersey, with the railroad lines of Central Railroad Company of New Jersey. Its diesel locomotives and freight cars are run on regular routes and fixed schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey in order to furnish through service as provided in an operating agreement between the parties.

Under the Interstate Commerce Act (§ 1, Pars. 4, 10 and 11, 49 U.S.C.A. § 1) common carriers subject to the provisions of the Act are required to interchange facilities and to establish through routes with other such carriers. The members of the Association of American Railroads, which included appellant; agreed under their Car Service and Per Diem Agreement to interchange freight cars at a per diem rental of $1.75. Appellant's entire fleet of 3,074 freight cars was subject to this agreement. It is stipulated by the parties in the instant case (S. F, Par. 15, R. 50a, 51a) that under the latter agreement appellant's freight cars were regularly, habitually, and continuously employed on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania.

On a car hire or car day ratio basis an average of 158 of appellant's freight cars (ante, pp. 10, 11) were run on fixed routes and regular schedules outside of Pennsylvania; and an average of 2,189 of appellant's freight cars (items (4) (b) and (5), ante, pp. 10, 11) were run regularly, habitually, and

continuously on lines of other railroads outside of Pennsylvania.

Pennsylvania, the domiciliary state, imposed an unapportioned property tax (Capital Stock Tax) upon all of appellant's diesel locomotives and freight cars. The Supreme Court of Pennsylvania held that the diesel locomotives had to be apportioned but without distinguishing between freight cars run on fixed routes and regular schedules and freight cars run on the lines of other railroads under the Car Service and Per Diem Agreement, it upheld the unapportioned property tax upon all of appellant's freight cars.

In reaching this conclusion the Supreme Court of Pennsylvania relied upon the decision of this Court in *New York Central and Hudson River Railroad Co. v. Miller*,[2] which appellant contends is contrary to, and conflicts with, the decisions of this court as cited under Question 1 (a) and (b) (ante, pp. 3, 4), which require apportionment of appellant's freight cars under the two situations referred to. In its Opinion the Supreme Court of Pennsylvania said (post, p. 30):

> "* * * Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules do not, although a certain average number may be present in another State, acquire a tax situs outside the domiciliary state."

The Supreme Court of Pennsylvania has refused to extend to railroad rolling stock the decisions of this Court requiring property tax apportionment involving other types of transportation equipment such as tank and refrigerator

[2] 202 U. S. 584, 26 S. Ct. 714 (1906).

cars, pullman palace cars, airplanes, and boats, barges and vessels operating on inland waters.

Thus, the power and jurisdiction of Pennsylvania, the domiciliary state, to levy an unapportioned property tax on railroad rolling stock under the circumstances in the instant case and the exposure of such railroad rolling stock to multiple property taxation by the several states present substantial Federal Questions under the Due Process and Commerce Clauses of the Federal Constitution. These questions in the instant case affect, and are of vital importance to, the entire railroad industry under similar circumstances.

(1) The Decisions of this Court Require Property Tax Apportionment of Units of Transportation Equipment Used and Employed in More Than One State.

In the case of real estate and tangible property physically present in only one State, only the State in which the property is located has power to levy property tax thereon. This Court has developed special rules to establish the power and jurisdiction of a State, either domiciliary or non-domiciliary, to levy a property tax on movable tangible property physically present and used in more than one State. Under these rules this court has held that the tax in practical operation must bear relation to opportunities, benefits or protection conferred or afforded by the taxing state.[3] As illustrative of the basis of these rules this Court said in *Johnson Oil Refining Company v. Oklahoma*[4] at p. 162:

> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of

[3] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949).

[4] 290 U. S. 158, 54 S. Ct. 152 (1933).

that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several states—the individual cars *constantly running in and out of each State*—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." (Emphasis added).

Habitual presence and employment are the criteria of the power of a State, either domiciliary or non-domiciliary, to levy a property tax on movable transportation equipment. Fixed routes and regular schedules are more clearly evidence of habitual presence and employment, but the special rules of property tax apportionment are not limited to transportation equipment moving on fixed routes and regular schedules provided there is evidence of habitual presence and employment.

(a) Appellant's freight cars run on fixed routes and schedules must be apportioned.

The decisions of this court are unanimous in requiring property tax apportionment under Due Process and the Commerce Clause where transportation equipment is run on fixed routes and regular schedules to and from the domiciliary state or other states.[5] Therefore, the judgment of the Supreme Court of Pennsylvania on these issues should be reversed.

(b) Appellant's freight cars not run on fixed routes and schedules but run habitually, regularly and contin-

[5] *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968 (1940); *Pullman's Palace Car Co. v. Pa.* 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

uously on lines of other railroads outside of Pennsylvania must be apportioned.

Seventy-one per cent of the time of all of appellant's freight cars or an average number of 2,189 were run habitually, regularly and continuously on the lines of other railroads outside of Pennsylvania under the Per Diem Rental Agreement. The Record does not disclose the amount of time and the average number of freight cars in each of the non-domiciliary states. However, the names of the using railroads are disclosed in the Record (S/F, Exhibits Y-3, Y-4 and Y-5, R. 132a—143a). As indicated heretofore, there is evidence also in the Record that appellant's freight cars were run habitually, regularly and continuously on lines of using railroads outside of Pennsylvania.

This Court has upheld apportioned property taxation by the non-domiciliary state of refrigerator cars,[6] tank cars,[7] boats, barges and vessels,[8] and airplanes.[9] The basis of the power to tax was habitual presence and employment in the taxing state. An apportionment ratio was used to determine the average units of property which were said to have a "permanent situs" for property tax purposes within the taxing state.

Under the same theory and principle of constitutional law under due process, this Court and others have held that the movement of units of transportation equipment regularly, habitually and continuously to and from the domiciliary state precludes the domiciliary state from levying an unapportioned property tax upon all such units of

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[6] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900).

[7] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[8] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[9] *Braniff Airways, Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

transportation equipment.[10] This result is reached in order to make the property tax of the domiciliary state bear relation to the opportunities, protections and benefits afforded by its laws. In these cases the domiciliary state is required to use an apportionment formula to determine the average number of units of the transportation equipment which were within its jurisdiction during the tax period. In these cases, also, the owning corporation (the taxpayer) was not required to establish by evidence the average number of units of transportation equipment which had obtained a situs in, and which had been taxed by, a non-domiciliary state.

Under the decisions of this court upholding apportioned property taxation by a non-domiciliary state on an average number of units and under the decisions of this court limiting the power of the domiciliary state to levy an apportioned property tax only upon the average number of units within its jurisdiction during the tax period, the Pennsylvania unapportioned property tax on all of appellant's freight cars operated by using railroads outside of Pennsylvania under the Per Diem Agreement violates the Due Process of the Laws Provisions of the Federal Constitution. Furthermore, the exposure of these freight cars of appellant to multiple property taxation by the several states in which they are employed and used violates the Commerce Clause of the Federal Constitution.[11] Therefore, on these issues the judgment of the Supreme Court of Pennsylvania should be reversed.

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[10] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles* (Cal.), 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001; *Scandinavian Airlines System Inc. v. County of Los Angeles* (2nd App. Dist. Div. 2) 6 West's Cal. Rep. 694, 183 Adv. Cal. App. Reports 69 (1969); Modified by S. Ct. of Cal. (May 29, 1961).

[11] *Standard Oil Company v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

(2) The Decision of this Court in New York Central and Hudson River Railroad Co. v. Miller Is Contrary to, and Is Not In Accord With, Its Property Tax Apportionment Decisions.

This case involved the railroad's claim for apportionment of the New York tax on railroad cars not running on fixed routes and schedules on the lines of the using railroads in and out of New York, the domiciliary state, and on the lines of other railroads outside of that state. This Court's ruling denying apportionment in that case is evidence of its reluctance at that time to extend property tax apportionment to railroad rolling stock. In view of its well established decisions requiring property taxation apportionment of transportation equipment, which we have discussed and referred to, and in view of the particular facts in the instant case, the reasons given by this Court in denying apportionment in the *Miller* case are not applicable for the following reasons:

(a) The fact of "continuity and regularity" of movement to and from, or absence from, the domiciliary state, which was lacking in the *Miller* case is present in the instant case under agreement of the parties.

(b) In the *Miller* case, this Court invoked the property tax rule applicable to vessels operating on the high seas, to wit: That vessels did not acquire "permanent situs" outside of the domiciliary state unless specific units were identified as usable outside throughout the entire tax year. This rule was rejected in its application to boats, barges and vessels operating on inland waters in *Ott v. Mississippi Valley Barge Line Co.*;[12] and had been rejected prior thereto in the property taxation of other types of equipment used in freight transportation on land, such as pullman

[12] 336 U. S. 169, 69 S. Ct. 432 (1949).

and tank cars.[13] Therefore, the home port rule in respect to vessels operating on the high seas is not applicable to railroad rolling stock today.

(c) This court in the *Miller* case did not apply the due process constitutional test of relation between tax and opportunities, benefits and protection afforded by the laws of the taxing state.

The Supreme Court of Pennsylvania has held in the instant case that even if if an average number of units of freight cars were present in another state the rule of the *Miller* case is applicable. This would seem clearly to be in error in view of the decisions of this court requiring property tax apportionment in such a situation.

(3) The Unapportioned Property Tax On Its Freight Cars Discriminates Against Appellant.

It is stipulated by the parties (S F, Par. 25 R. 54a, 55a; and amended S F, R. 159a) that in settling the capital stock tax, a property tax, against other railroads with trackage extending beyond the borders of Pennsylvania, apportionment was allowed for freight cars while on the lines of other railroads outside of Pennsylvania under the Per Diem Agreement. Appellant's contention of discrimination was overruled by the Supreme Court of Pennsylvania on the grounds that it was reasonable for the Pennsylvania Legislature to classify railroads whose trackage lay wholly within the state such as appellant, and railroads having trackage outside of the state, and to deny apportionment to appellant and to allow apportionment to the latter companies.

Since the Supreme Court of Pennsylvania had found that freight cars used pursuant to the Per Diem Agreement had not obtained a tax situs outside of Pennsylvania

[13] *Pullman's Palace Car Co. v. Pa.* 141 U. S. 18 11 S. Ct. 876 (1891); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

(post, p. 33) and that all of the freight cars at full value are taxable at the domicile of the owner, it is submitted that the classification ruling is arbitrary because tax situs cannot be established by classification. Furthermore, it is the intent of the Pennsylvania Tax Statute (post, p. 23) to impose tax on only so much of property and assets as is within the jurisdiction of the state.[14]

Therefore, the classification relied upon by the Supreme Court of Pennsylvania is not based on differences which are reasonably related to the purposes of the Tax Statute;[15] does not impose like burdens and liabilities upon all taxpayers similarly situated;[16] and violates the equal protection of the laws provisions of the Federal Constitution. On this point, therefore, the judgment of the Supreme Court of Pennsylvania should be reversed.

F. CONCLUSION

It is therefore respectfully submitted that this Court has jurisdiction of this appeal; that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

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208 Walnut Street,
Harrisburg, Pennsylvania.
Attorney for Appellant.

[14] *Commonwealth v. Delaware, Lackawanna & Western Railroad Co.*, 145 Pa. 96, 22A. 157 (1891).

[15] *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344 (1957).

[16] *Atchison, Topeka and Santa Fe Railroad Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609 (1899).

APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, * * *, it shall be the duty of every corporation having capital stock, * * *, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, * * *, now or hereafter incorporated or organized by or under any law of any other State, * * *, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

* * * * * * *

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal * * * of the capital stock of said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made.

Section 21(a) of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21(a). That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, * * * as ascertained in the manner prescribed in said twentieth section: * * *.

Section 1 of the Act of June 22, 1931, P. L. 685, 72 Purdon's Pennsylvania Statutes § 1896.

Section 1. Whenever any corporation * * * subject to tax upon its capital stock imposed by and under the laws of this Commonwealth, owns assets which are exempted or relieved from the capital stock tax under the laws of this Commonwealth, the proportion of the capital stock exempted or relieved from the capital stock tax, by reason of the ownership of such assets, shall be the proportion which the value of such assets bears to the value of the total assets owned by such corporation * * *.

APPENDIX B.

COPY OF OPINION AND JUDGMENT BELOW.

(As reported in 403 Pa. 419; 169 A. (2d) 878; headnotes and names of counsel omitted).

Commonwealth v. Central Railroad Company of Pennsylvania, Appellant.

Argued October 3, 1960. Before JONES, C. J., MUSMANNO, JONES, COHEN, BOK and EAGEN, JJ.

Appeal No. 24 May Term, 1960, from judgment of Court of Common Pleas of Dauphin County, No. 274 Commonwealth Docket, 1954, in case of *Commonwealth of Pennsylvania v. Central Railroad Company of Pennsylvania.* Judgment, as modified, affirmed; reargument refused May 25, 1961.

Proceedings on appeal from refusal of review by Board of Finance and Revenue of capital stock tax. Before NEELY, P. J., SOHN and KREIDER, JJ., and RICHARDS, P. J., specially presiding.

Adjudication filed dismissing appeal and finding for plaintiff; defendant's exceptions to adjudication dismissed; and final judgment entered. Defendant appealed.

Opinion by Mr. Justice Cohen, April 17, 1961*:

This is an appeal from the decision of the Court of Common Pleas of Dauphin County sustaining the action of the Board of Finance and Review in refusing appellant's petition for resettlement of its capital stock tax, Act of 1889, P. L. 420, §§ 20, 21, as amended, 72 PS §§ 1871, 1901, 1902, for the year 1951.

Appellant, Central Railroad Company of Pennsylvania, a domestic corporation, operates a railroad, the tracks of

* As modified by letter of the Prothonotary of The Supreme Court of Pennsylvania dated May 16, 1961.

which are solely within Pennsylvania. Appellant interchanges freight cars with connecting carriers as required by the Interstate Commerce Act of 1920, as amended, 49 USCA § 1, pars. 9-14 (1959), thereby promoting the rapid and efficient through movement of freight in contrast to the prior burdensome practice of transferring freight from cars of one railroad to the cars of another. Under the current "car service and per diem agreement" entered into by appellant and all other members of the Association of American Railroads, the owning railroad is paid a per diem rate of $1.75 for its freight cars while on the lines of other railroads.

Appellant also interchanges freight cars and diesel locomotives pursuant to an "operating agreement" with the Central Railroad Company of New Jersey, a New Jersey corporation which has no trackage in Pennsylvania. Appellant and the Central Railroad of New Jersey run regularly scheduled trains between Pennsylvania and New Jersey.

In its capital stock report for 1951, appellant claimed that an average proportionate value of its diesel locomotives and freight cars which were employed on lines of other railroads outside of Pennsylvania were not subject to the capital stock tax. The settlement of appellant's tax did not allow such claim. Resettlement and review of the settlement were refused and an appeal to the Court of Common Pleas of Dauphin County followed.

The case was tried without a jury and most of the facts were contained in a stipulation. Thereafter the case was argued before the court *en banc* which entered a judgment *nisi*. The appellant filed exceptions which, on final judgment, were overruled by the court. This appeal followed.

Appellant maintains that the commerce clause of the Federal Constitution and the due process of the laws provision of the Federal and Pennsylvania Constitutions are violated by the unapportioned capital stock tax imposed

on appellant's diesel locomotives and freight cars. The tax as settled against appellant is similarly attacked as violating uniformity of taxation and equal protection of the laws.

The Pennsylvania Capital Stock Tax is a tax upon the actual value of the capital stock of a domestic corporation as represented by its property and asets: *Commonwealth v. Southern Pennsylvania Bus Company*, 339 Pa. 521, 15 A. 2d 375 (1940). Since the Commonwealth does not have power to tax tangible property located beyond its jurisdiction, so much of the value of the capital stock as is represented by such property is exempt from the tax: *Delaware, Lackawanna and Western Railroad Company v. Pennsylvania*, 198 U. S. 341 (1905). Thus, we must ascertain whether Pennsylvania has jurisdiction to impose an unapportioned tax on all of appellant's rolling stock.

Although the commerce clause has long been considered to be a limitation upon the power of the states to tax an instrumentality of commerce, the law has evolved to a point where the states are not unduly restrained by that doctrine in their efforts to tax instrumentalities of commerce. As the United States Supreme Court recently stated in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590 (1954): "While the question of whether a commodity enroute to market is sufficiently settled in a state for purposes of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." 347 U. S. at 598, 599. And due process considerations do not necessarily prohibit the domiciliary state from taxing a corporation's personal property which is located outside the state. See *Greenough v. Tax Assessors*, 331 U. S. 486, 491 (1946). Where, however, the particular property has a tax situs outside of the domiciliary

state it would be a violation of due process for the domiciliary state to tax the property at full value since ". . . there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations." *Standard Oil Company v. Peck*, 342 U. S. 382, 384, 385 (1952).

The crucial issue for our determination therefore is whether any of appellant's freight cars and diesel locomotives obtained a tax situs outside this Commonwealth. In order to determine this issue we must review the cases which have considered the question of tax situs in respect to the rolling stock of railroads, vessels of shiplines and, most recently, the flight equipment of airlines.

The continuous and constant use of a portion of a railroad's rolling stock in a non-domiciliary state has been upheld as constituting a tax situs for that portion. In *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18 (1891), Pennsylvania was permitted to impose its capital stock tax on pullman cars traveling on fixed routes and schedules within this jurisdiction. The tax was apportioned on the basis of a mileage traveled or operated ratio. There the court stated that although particular cars may not remain within the state ". . . the Company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property. . . ."

Similarly in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), the court sustained a Colorado property tax against an Illinois corporation which leased refrigerator cars to shippers and carriers throughout the nation. The average number of cars "permanently located" within Colorado was held subject to the tax.

In *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1900), the Supreme Court sustained a Utah property tax on an average number of refrigerator cars determined

under facts similar to those in *American Refrigerator Transit Co. v. Hall, supra.*

The Supreme Court first ruled on the power of the domiciliary state to tax the full value of rolling stock in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905). There Kentucky, the domiciliary state, attempted to levy personal property taxes on the rolling stock (refrigerator cars) of the Union Refrigerator Transit Company. During the years involved, the cars were rented to shippers who took possession of the cars in *Wisconsin* and used them in Canada and Mexico as well as throughout the United States. The court held that Kentucky could not tax the cars since they were "permanently located" in other states.[1]

New York Central Railroad & Hudson River Company v. Miller, 202 U. S. 584 (1906), similarly dealing with the taxing power of the domiciliary state, was decided the next year. There the railroad was a domestic corporation owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing and rating and sending its cars to points without as well as within the state, and over other lines as well as its own. By the familiar course of railroad business a considerable proportion of the taxpayer's cars were constantly out of the state, and upon this ground the taxpayer contended that the proportion should be deducted from its entire capital, in order to find the capital stock employed within the state. In deciding that New York could tax all of the railroad's property at full value the court stated, ". . . [in] the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences re-

[1] Permanent absence of a particular piece of railroad rolling stock has never been a requisite for exemption from taxation by the domiciliary state. See Note 5 in the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944), for a discussion of this issue.

lied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. . . ." [2] 202 U. S. at 597, 598.

The rules of law to be extracted from the aforementioned railroad cases are, in our opinion, determinative of the issues before this court. Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state.

Both parties to this appeal nevertheless maintain that subsequent Supreme Court decisions have altered the above rules. We do not agree.

In *Johnson Oil Refining Co. v. Oklahoma ex rel Mitchell*, 290 U. S. 158 (1933) the court ruled that Oklahoma could not levy an unapportioned tax upon 100% of the rolling stock of a refining company domiciled in Illinois. The *ratio decidendi* of the case was that the tank cars which made *regular* trips from the taxpayer's Oklahoma refineries to out-of-state purchasers acquired a proportionate tax situs in each state through which it passed on such trips. The *Johnson* case, *supra*, is in accord with the prior tank and refrigerator car cases and does not alter the holding in *New York Central Railroad & Hudson River Company v. Miller*, *supra*,

[2] *See Commonwealth of Kentucky v. Union Pacific Railroad Company*, 214 Ky. 349, 283 S.W. 119 (1926), where the Supreme Court of Kentucky used comparable language when denying that Commonwealth the power to tax a non-domiciliary's freight cars which were running on the lines of a domestic railroad pursuant to an operating agreement. The Kentucky court distinguished the pullman, tank and refrigerator car cases on the issue of substantial profit received by the tank line and like companies for use of their cars when in a foreign state.

in respect to the tax situs of freight cars which are freely and irregularly interchanged by cooperating railroads.

The more recent Supreme Court decisions deal with instrumentalities of commerce other than railroad cars.

In *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), the Supreme Court departed from the traditional view that a vessel could be taxed only by the state of domicile and upheld the power of Louisiana to tax "an average portion of property of a foreign corporation operating an interstate barge line, permanently within the state." Shortly thereafter in *Standard Oil Co. v. Peck, supra*, the Supreme Court reconsidered the power of the domiciliary state to tax vessels at full value. There the tug boats and barges of an Ohio corporation were used on the Ohio and Mississippi Rivers where they moved regularly to and from Ohio and other points on the two rivers. Only a small part of the transportation was on waters within or bordering Ohio. The court found that, although no one vessel was continuously in another state during the taxable year, the boats and barges "were almost continuously outside of Ohio during the taxable year." The court denied the power of Ohio, the domiciliary state, to levy an unapportioned property tax on all of the boats and barges. It ruled that other states under *Ott v. Mississippi Valley Barge Line Co., supra*, had the power to levy an apportioned tax on the vessels and that the existence of this power, whether exercised or not, precluded property taxation on all of the property by the domiciliary state.

The Supreme Court first considered property taxation of airlines in 1944. In *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944), the Supreme Court sustained a property tax assessed by Minnesota, the domiciliary state, upon the entire value of a fleet of planes which were operated on regular routes and fixed schedules in Minnesota and seven of the Northwestern states. This case, heavily relied upon by the court below and the Commonwealth, must, however, be read in light of two subsequent decisions. In *Standard*

Oil Co. v. Peck, supra, (1952) the court denied the power of the domiciliary state to tax the entire value of the boats and barges which were subject to apportioned property taxes by other states. And, when confronted with the power of a non-domiciliary state to assess a proportional property tax on the flight equipment of an airline, the Supreme Court in *Braniff Airways v. Nebraska Board of Equalization and Assessment, supra*, (1954), all but nullified the ruling in the *Northwest* case.

In *Braniff, supra*, the court sustained an apportioned personal property tax imposed by Nebraska, a non-domiciliary state, on the flight equipment of scheduled airlines. Braniff Airlines, Inc., the taxpayer in that case, made eighteen regular stops a day in Nebraska, rented ground facilities in that state and received one-tenth of its revenue from its Nebraska operations. The *Northwest* case, *supra*, was distinguished in *Braniff* on the ground that in *Northwest* there was no showing that the property had acquired a tax situs in states other than the domiciliary.

Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings have changed the standards established for the taxation of railroad rolling stock.

Under those standards the diesel locomotives of the Central Railroad Company of Pennsylvania which continuously travel on fixed routes and schedules to and from New Jersey pursuant to the operating agreement with the Central Railroad of New Jersey have obtained a tax situs in New Jersey and thus cannot be taxed for full value by this Commonwealth. Appellant's railroad freight cars (including those which may travel on the lines of the Central Railroad of New Jersey), which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them. Since

the freight cars used pursuant to the car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value.

Appellant, in addition, contends that the tax as settled against it violated uniformity of taxation and equal protection of the law. The essence of this argument is that other domestic railroad corporations whose tracks extend beyond this state were subjected to an apportioned capital stock tax settlement (based upon the percentage of total trackage in Pennsylvania) which included a proportion of their freight cars operating on the lines of other railroads outside of Pennsylvania, while appellant receives no exemption on its cars operating without the state on the lines of other railroads. This argument is devoid of merit since the classification was clearly reasonable. See *Commonwealth v. Fireman's Fund Ins. Company*, 369 Pa. 560, 565, 87 A. 2d 255 (1952).

Apportionment of railroad rolling stock based upon track mileage has been held to be a valid taxing standard where the lines of a domiciliary railroad corporation extend beyond the border of that state. See *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362 (1940). Appellant obviously could not qualify for such apportionment since it does not have tracks without the state. The Commonwealth was clearly justified when it included freight cars on the lines of other railroads in the proportionate exemption from the capital stock tax of railroads that had tracks without as well as within Pennsylvania. Under the tracks-mileage apportionment standard and the aforementioned tax situs rules for freight cars, such freight cars acquired a tax situs only in those states in which the tracks of the railroad were situated and this tax situs was based solely on the percentage of trackage in the particular state. That method of taxation is perfectly consistent with our holding in this case.

Judgment as modified is affirmed.

APPENDIX C.

PETITION OF APPELLANT TO COURT TO CONSIDER ITS PETITION FOR REARGUMENT AND ORDER THEREON.

Petition To Consider (Filed May 17, 1961).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, petitions your Honorable Court to consider its Petition for Reargument, being filed concurrently herewith, and to take action thereon either granting reargument or denying the said Petition for Reargument for the following reasons:

1. The Petition for Reargument is being filed within thirty (30) days of the entry of the Court's Opinion and Judgment on April 17, 1961.

2. Appellant desires to take an appeal to the Supreme Court of the United States to review said Opinion and Judgment and to comply with requirements to do so.

3. Rule 11(3) of the Supreme Court of the United States provides:

> "1. An appeal [to review the judgment of a state court of last resort] in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal [within ninety days after the entry of said judgment].

4. Appellant believes that Rule 15(1)(b)(ii) of the Supreme Court of the United States relating in part to the content of the Jurisdictional Statement to be filed with that Court contemplates as a condition precedent to the taking of an appeal to the Supreme Court of the United States by

the appellant in the instant case that a Petition for Reargument shall be filed with, and action on the merits thereof shall be taken by, the Supreme Court of Pennsylvania. This Rule provides:

> "(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, *the date of any order respecting a rehearing*, the date the notice of appeal was filed, and the court in which it was filed." (Emphasis supplied.)

Wherefore, appellant prays your Honorable Court to consider its Petition for Reargument and to take action on the merits thereof.

Respectfully submitted,

ROY J. KEEFER,
Attorney for Appellant.

Order Entered on Petition To Consider.

May 25, 1961, it is hereby ordered that the within petition for reargument be filed with the same effect as if it had been filed within the period prescribed by rule of this court.

PER CURIAM.

APPENDIX D.

PETITION FOR REARGUMENT AND ORDER ENTERED IN SUPREME COURT OF PENNSYLVANIA, No. 24 MAY TERM, 1960.

Petition of Appellant for Reargument (Filed May 17, 1961).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

The petition of Central Railroad Company of Pennsylvania, appellant in the above case, by its attorney, Roy J. Keefer, respectfully requests your Honorable Court to grant to it a reargument for the reasons set forth below. The judgment of the lower court, *as modified*, was affirmed by this Court on April 17, 1961.

The modification required apportionment of diesel locomotives run on fixed routes and regular schedules in and out of Pennsylvania. The lower court was affirmed: (1) in denying apportionment for freight cars run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of General Railroad Company of New Jersey (CNJ) in New Jersey; (2) in denying apportionment for *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental; and (3) in holding that the tax settlement did not discriminate against appellant. This petition relates only to the affirmance.

Appellant's reasons for Reargument are that the Court erred: (1) in denying apportionment for appellant's freight cars run on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ in New Jersey; (2) in relying upon the rule in the case of *New York Central Railroad & Hudson River Company*, 202 U. S. 584, in denying apportionment of *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per

diem rental agreement; (3) in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require apportionment of, appellant's *other* freight cars while on the lines of *other* railroads outside of Pennsylvania under a per diem rental agreement; and (4) in holding that the capital stock tax settlement did not discriminate against appellant.

I. Appellant's freight cars run on fixed routes and regular schedules in and out of Pennsylvania must be apportioned for property tax purposes.

Appellant's diesel locomotives and *some* of its freight cars were run on fixed routes and regular schedules over the lines of appellant in Pennsylvania and over the lines of CNJ in New Jersey under the *same* Operating Agreement between the parties (Stipulation of Facts, par. 14, R. 50a; and Exhibit A attached thereto, R. 58a-65a). The only difference between locomotives and freight cars is the basis of compensation to appellant while on the lines of CNJ in New Jersey: for locomotives, a mileage rate; and, for freight cars, a per diem rental. Insofar as appellant's freight cars were run on fixed routes and regular schedules over appellant's lines in Pennsylvania and over the lines of CNJ in New Jersey, they were used under the Operating Agreement *and not* under the Car Service and Per Diem Agreement. The compensation to appellant was rental at the same rate as provided under the latter agreement.

This Court has held that the diesel locomotives so used must be apportioned. Appellant submits that the same facts, circumstances and legal prinieples require apportionment of its freight cars similarly used.

The parties have agreed and stipulated that appellant owned 3,074 freight cars, having an aggregate average net book value of $10,225,769, or an average net book value per car of $3,326.52 (S. F, par. 16, Exhibits Y-2 and Z, R. 51a,

131a, 145a); that appellant's freight cars run on fixed routes and regular schedules were on the lines of CNJ 57,689 car days out of total car days of 1,122,010 (S/F, par. 14, Exhibits Y-2 and Y-5, R. 50a, 131a, 134a).

On the basis of these stipulations, the apportionment of the average value and average number of appellant's freight cars to the lines of CNJ outside of Pennsylvania for 1951 is determined as follows:

$$\frac{57{,}689 \times \$10{,}225{,}769}{1{,}122{,}010} = \$525{,}765.71 \text{ average value}$$

divided by \$3,326.53 = 158 average number.

See page 11 of appellant's brief.

Therefore, appellant submits that an average of 158 freight cars having an average net book value of \$525,765.71 must be apportioned outside of Pennsylvania for 1951 for capital stock tax purposes; and that this Court erred in not so holding.

II. The Court erred in relying upon the rule in New York Central Railroad & Hudson River Company, 202 U. S. 584, in denying apportionment of other freight cars of appellant while on the lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement.

Three principal reasons support this proposition:

First, this Court, in the *Miller* case, relied principally upon the property tax rule applicable to vessels operating on the high seas, to wit, that "the state of origin remained the situs of the property, notwithstanding its occasional excursions to foreign ports", citing *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409 (1906). This meant that the property was taxable by the domicile unless the property had acquired a situs elsewhere by remaining beyond the domi-

cile's borders for the *whole* tax period. This rule was rejected in its application to boats, barges and vessels operating on *inland* waters;[1] and had been rejected prior thereto in the property taxation of other types of equipment used in interstate transportation on land, such as Pullman and tank cars.[2] Therefore, the rule was not applicable to railroad equipment.

Second, this Court, in the *Miller* case, distinguished the *Pullman* case on the ground that the average unit property taxation apportionment rule in that case was based upon an average number of the *same* cars and not upon an average number of *constantly changing* cars; but, since the *Miller* case, the rule has been recognized as applicable or extended to an average number of constantly changing cars or units of equipment receiving protection under the laws of the taxing state.[3] Had the extended rule been recognized at that time, the result in *Miller* might have been different, and, therefore, the *Miller* decision is not controlling in the instant case.

Third, the fact of "continuity and regularity" of movement to and from the domiciliary state which was absent or lacking in the *Miller* case is present in the instant case. Here, the parties have stipulated and agreed that, under the Car Service and Per Diem Agreement, appellant's "freight cars were *regularly, habitually* and/or *continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and

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[1] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

[2] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

[3] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania" (S/F, par. 15, R. 50, 51a). It is this fact of regular, habitual and continuous movement of transportation equipment to and from the domiciliary state or the taxing state which establishes, and requires the use by the domiciliary or other state of, the average unit property taxation rule of apportionment regardless of whether the average units of transportation equipment are run on fixed routes and regular schedules[4] or not[5]. See also dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292 (1944), pp. 321-325 and note 5 at pp. 324 and 325.

The existence of the fact of regular, habitual and continuous movement to and from the domiciliary state establishes *absence* from the opportunities, protection and benefits afforded by the laws of the domiciliary state, *thereby precluding* the domiciliary state from imposing a property tax upon the full value of the transportation equipment—*Union Refrigerator Transit Co. v. Kentucky*, *Peck* and *Flying Tiger* cases.

Therefore, it is submitted, on the basis of these three reasons, that the rule of the *Miller* case is not controlling in the instant case.

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[4] *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 76 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[5] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 U. S. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, (Cal.), 333 P. 2d 323 (1958) cert. den. 359 U. S. 1001; *Oklahoma Tax Commission v. American Refrigerator Transit Co.* (Okla.), 346 P. 2d 746 (December 22, 1959).

III. The Court erred in holding that decisions of the Supreme Court of the United States involving other types of equipment used in interstate transportation were not applicable to, and did not require, apportionment of appellant's other freight cars while on the lines of other railroads outside of Pennsylvania under a per diem rental agreement.

There is involved here the highly important issue whether there is a limitation on the constitutional power of the domiciliary state under due process and the Commerce Clause to levy an *unapportioned* property tax on appellant's freight cars operated under the Car Service and Per Diem Agreement.

In order to prove appellant's proposition stated above, we beg the Court's indulgence to summarize the applicable facts, to discuss the principles established in the decisions and to apply them to the facts in the instant case. These will establish the Court's error.

(a) The Facts.

Appellant's fleet of freight cars numbered 3,074 which developed total car days of 1,122,010 (S. F. par. 15 and Exhibits Y-2-Y-5, R. 50a, R. 131a-R. 143a).

The parties have stipulated as a fact of Record (S. F. par. 15, R. 50a) as follows:

> "Under the said Car Service and Per Diem Agreement, defendant's freight cars were *regularly, habitually and or continuously* employed on the lines of other railroads operating wholly within Pennsylvania, on the lines of other railroads within and without Pennsylvania, and on the lines of other railroads wholly without Pennsylvania." (Emphasis supplied)

From Exhibits Y-2 to Y-6, inclusive (R. 131a-R. 144a), the following is developed:

Total Car Days		1,122,010
Fixed Routes and Regular Schedules (Operating Agreement):		
Appellant's road in Pennsylvania (Y-2)	104,479	
Road of CNJ in New Jersey (Y-5)	57,689	
Car Days	162,168	162,168

Average cars: $\frac{162,168}{1,122,010} \times 3,074 \text{ cars} = 444.29$

Total Car Days—Car Service and Per Diem Agreement		959,842
Regular, habitual and continuous employment on lines of other railroads:		

	Percentage	*Car Days*	
In Pennsylvania (Y-3, Y-4)	16.75%	160,776	
Out of Pennsylvania (Y-4, Y-5)	83.25%	799,066	
			959,842

Total Freight Cars—Car Service and Per Diem Agreement: 3,074 minus 444.29 = 2,629.71

	Percentage	*Average Cars*
Average cars—Pennsylvania $\frac{160,776}{959,842} \times 2,629.71 =$	16.75	440.48
Average cars—out of Pennsylvania $\frac{799,066}{959,842} \times 2,629.71 =$	83.25	2,189.23

For determination of the average number of appellant's freight cars on the lines of specific railroads outside of Pennsylvania, where the car days on an individual road exceed 4,000, see pages 39, 40 and 41 of appellant's brief.

(b) Discussion of Cases.

The fundamental principle that taxation and protection are correlatives has been adopted as the current due process constitutional test of a state's power to tax movable tangible property—that is, physical presence within the taxing state and the *extent* to which protection, opportunities and benefits are afforded to such property by the taxing state,[6] and this test is particularly applicable to transportation equipment used in interstate commerce. Concerning this test, the Court, in the *Ott* case said, at page 25:

> "* * * So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state."

The basic fact of *continuous, habitual* and *regular* movement of transportation equipment to and from the state of domicile, from and to other states, supports the taxing power of the foreign state to levy an *apportioned* property tax[7] and denies the taxing power of the domiciliary state to levy an unapportioned property tax.[8]

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[6] *Standard Oil Co. v. Peck*, 342 U. S. 382, 385, 72 S. Ct. 309 (1952); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36 (1905); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246 (1940); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949).

[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Oklahoma Tax Commission v. American Refrigerator Transit Co.* (Okla.), 349 P. 2d 746 (1959); *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 183 Advance California Appellate Reports 69 (1960).

[8] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

This basic fact is a stipulated fact of Record in the instant case (S. F, par. 15, R. 50a).

The existence of this basic fact gives to the foreign state the constitutional power under due process to determine the "permanent situs" of *an average number of units* (average unit rule) within the state by some reasonable apportionment ratio (time, miles, stops, business volume, car days, etc.) and to levy a property tax thereon (cases cited in note 7). The rationale of these cases establishing this principle and rule is well-stated in the *Johnson Oil Refining Co.* case (note 7) at page 162 as follows:

> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several states—the individual cars *constantly running in and out of each State*—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." (Emphasis supplied)

The existence of the basic fact of continuous, habitual and regular movement of transportation equipment to and from the state of domicile denies to the domiciliary state the constitutional power under due process to levy a property tax upon the *full value* of *all units of transportation equipment so used* because in such case the tax would bear no relation to "opportunities, benefits or protection conferred or afforded by the taxing state" (absence from the domiciliary state)[9] and would violate the Commerce Clause

[9] See case cited in note 8.

because the tax on the full value imposed by the domicilary state duplicates an apportioned property tax which foreign states have power to impose (whether exercised or not) upon the same equipment so used within their jurisdiction.[10]

The case of *Union Refrigerator Transit Co. v. Kentucky, supra,* establishes beyond any doubt that the limitation on the constitutional power of the domicilary state is based upon "continuous, regular and habitual" *absence* from the domiciliary state and it established beyond any doubt that an average number of units have obtained a "permanent situs" outside the domiciliary state without requiring proof that an average number of units have obtained such situs in a specific foreign state and that such foreign state has exercised its constitutional power to levy an apportioned property tax thereon. Mr. Chief Justice Stone in note 5 to his dissenting opinion in the *Northwest Airline* case explains the *Union Refrigerator* case at pages 324, 325:

> "'[5] In *Union Transit Co. v. Kentucky,* 199 U. S. 194, it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident

[10] *Standard Oil Co. v. Peck,* 342 U. S. 382, 72 S. Ct. 309 (1952). Dissenting Opinion of Mr. Chief Justice Stone in *Northwest Airlines Inc. v. Minnesota,* 322 U. S. 292, 64 S. Ct. 950 (1944), pages 310, 312-317, 325.

from its citation (p. 206) of *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, and *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, as cases involving property "permanently located" in the taxing states. Both cases involved rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211.)' "

The undisputed ratio decidendi of the cases in note 8 is stated in *Scandinavian Airlines Systems Inc. v. County of Los Angeles* (1960)[11] at pages 701-702 as follows:

"The rationale of these cases *is not based on the necessity to avoid double taxation* but, rather on the recognition of the non-domiciliary state's right to fair compensation for the protection and benefits afforded the taxpayer. The power to tax flows from *presence* of the property in the taxing state and the concomitant privileges enjoyed by the owners while thus employed within the jurisdiction. It is the 'unfairness' of the original 'domicile' or 'permanent presence' doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different formulae. Thus, the *onus* of double taxation *falls* not on the jurisdiction levying a fairly apportioned tax but *upon the domiciliary jurisdic-*

[11] 6 West's California Reporter 694, 183 Advance California Appellate Reports 69 (1960).

tion which refuses to apportion its taxes on the basis of benefits and protections actually conferred". (Emphasis supplied.)

Thus, the basic fact of "regular, habitual and continuous" movement of transportation equipment to and from the domiciliary state, from and to other states, whether running on fixed routes and regular schedules[12] or not" gives to the foreign state the constitutional power under due process to determine the average number of units having a "permanent situs" within its borders on some reasonable basis of apportionment and to levy a property tax thereon; and the existence of the same basic fact requires the domiciliary state to determine the average number of units having a "permanent situs" beyond its borders by some reasonable basis of apportionment and limits its constitutional power under due process to levy a property tax upon only the average number of units within its jurisdiction.[14] In this latter situation, the taxpayer does not have the burden and is not required to prove the average number of units in other specific states.[15]

---

[12] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 183 Advance Cal. Appellate Reports 69 (1960).

[13] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952). *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001; *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

[14] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

[15] Cases cited note 14.

(c) THE ERRORS OF THE COURT.

In rejecting appellant's claim for apportionment of its freight cars while on the lines of other railroads outside of Pennsylvania and in upholding the unapportioned property tax levied by Pennsylvania, the domiciliary state, upon the full value thereof, this Court said, at page 6 of its opinion:

> "* * * Railroad rolling stock which travels in interstate commerce upon fixed routes and regular schedules cannot be taxed at full value by the domiciliary state since it has acquired a tax situs elsewhere. On the other hand, freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, although a certain average number may be present in another state, acquire a tax situs outside the domiciliary state."

and, at pages 9 and 10 of its opinion:

> "Thus, after reviewing the recent Supreme Court rulings, we must reject the contention that these rulings have changed the standards established for the taxation of railroad rolling stock.
>
> "Under those standards the diesel locomotives of the Central Railroad Company of Pennsylvania which continuously travel on fixed routes and schedules to and from New Jersey pursuant to the operating agreement with the Central Railroad of New Jersey have obtained a tax situs in New Jersey and thus cannot be taxed for full value by this Commonwealth. Appellant's railroad freight cars (including those which may travel on the lines of the Central Railroad of New Jersey), which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them. Since the freight cars used pursuant to car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in * * *."

In so holding, this Court committed four fundamental errors:

1. It ignored and disregarded the stipulated fact of Record in the instant case (S/F, par. 15, R. 50a) that appellant's freight cars run *regularly, habitually* and *continuously* on the lines of other railroads in, in and out of, and wholly outside of, Pennsylvania.

(i) This compounds the same error committed by the Commonwealth in its brief and by the court below in its opinion and judgment.

(ii) A fortiorari, there is regularity, habituality and continuity of movement where fixed routes and regular schedules are involved *but such movement exists also in the absence of fixed routes and regular schedules* as in the case of tank cars, boats, barges, vessels and airplanes involved in the cases cited in note 13. There is no difference between these cases and the instant case. This distinguishes the case of *Commonwealth of Kentucky v. Union Pacific Railroad*, 214 Ky. 349, 283 S. W. 119 (1926) where "regularity, habituality and continuity" was not a fact of Record, but the court described the journey in Kentucky of the freight cars there involved as "not in the course of travel upon fixed routes but random excursions of casually chosen cars". That case, like the *Miller* case, relied upon by the Court in the instant case, is not applicable or controlling. The logic of the criticism of that case by the author of an Annotation in 49 A.L.R., 1103, is unanswerable. See also appellant's brief, pages 46 and 47.

(iii) The stipulated fact distinguishes the instant case from the *Miller* case (242 U. S. 202), or, speaking bluntly, the rule in that case is not controlling.

2. The second error is the holding that, even though an average number of appellant's freight cars may be present in another state, they do not acquire a tax situs outside the domiciliary state.

(i) The presence of an average number of appellant's freight cars in another state (and this is the actual situation in the instant case, as shown by summary of the facts above) arises from the fact of regular, habitual and continuous movement and gives the foreign state constitutional power under due process to determine that an average number of units has a "permanent situs" within its borders and to levy an apportioned property tax thereon. This is the very essence of the average unit rule, and, therefore, the holding by this Court referred to is contrary to the decisions cited in note 7. Thus, an average number of appellant's freight cars has obtained a tax situs outside the domiciliary state of Pennsylvania.

(ii) The *existence* of the constitutional power of the foreign or other state to levy an apportioned property tax on appellant's freight cars, *whether exercised or not* (not exercised in the instant case), precludes Pennsylvania, the domiciliary state, from levying an unapportioned property tax upon *all* of appellant's freight cars used on the lines of other railroads (2629.71); and, for this Court to hold otherwise, flies directly in the teeth of a specific ruling to that effect in the case of *Standard Oil Co. v. Peck, supra.*

(iii) The cases cited in notes 7 and 13 are applicable and support the above conclusions and, therefore, this Court was in error in holding that they are not applicable and are not controlling.

3. The third error of this Court is that its ruling upholding the unapportioned property tax by Pennsylvania upon the *full* value of *all* of appellant's freight cars used on the lines of other railroads violates the limitation under due process on the constitutional power of the domiciliary state, which requires relationship between the tax imposed and opportunities, benefits and protection afforded by its laws in the operation of the freight cars.

(i) The facts of Record establish that 2629.71 of appellant's freight cars used on the lines of other railroads were

used regularly, habitually and continuously outside of Pennsylvania 83.25% of the time during the year 1951, and that, under these facts, it must be determined on a car-day ratio basis (see computation under summary of facts above) that an average number of 2189.23 of appellant's freight cars had a "permanent situs" outside of Pennsylvania and were beyond the power of Pennsylvania, the domiciliary state, to levy a property tax thereon. Under the same facts, only an average number of 440.48 of appellant's freight cars were subject to the Pennsylvania tax.

(ii) The cases cited in note 14 are applicable and fully support these conclusions; and, therefore, this Court was in error in holding that they are not applicable and are not controlling.

4. The fourth error of this Court is that it ruling upholding the unapportioned property tax by Pennsylvania upon the full value of all of appellant's freight cars used on the lines of other railroads when other states have the constitutional power to levy an apportioned property tax upon the average number of freight cars within their jurisdiction constitutes multiple property taxation of instruments of interstate commerce in violation of the Commerce Clause of the Federal Constitution. The cases cited in note 10 fully support this conclusion.

Appellant respectfully submits that it has established the errors of this Court, which is the subject of this section of the Petition for Reargument.

IV. The Court erred in holding that the tax settlement did not discriminate against appellant.

The appellant contended that the denial of apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under a per diem rental discriminated against it because apportionment was allowed by the tax authorities for the year 1951 for freight cars under

similar circumstances to railroads incorporated in Pennsylvania with trackage within and without Pennsylvania. In such case, the apportionment consisted of ratio of track miles outside of Pennsylvania to total track miles applied to rolling stock, including freight cars on the lines of other railroads under a per diem rental agreement.

This Court overruled appellant's contention on the ground that classification between railroads not having trackage outside of Pennsylvania and railroads having trackage in and out of Pennsylvania, thereby denying apportionment to the former and allowing apportionment to the latter, is reasonable.

Appellant respectfully submits that this ruling of the Court constitutes disdain for reality and is without foundation.

In denying appellant's claim for apportionment of freight cars, grounded on due process, the Court said, at pages 9 and 10 of its opinion:

> "Since the freight cars used pursuant to car service and per diem agreement of the Association of American Railroads *have not attained a tax situs outside of Pennsylvania* it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value." (Emphasis supplied.)

This ruling can only mean that the freight cars so used did not obtain a tax situs outside of Pennsylvania by such use, and are taxable only by the domiciliary state.

Appellant respectfully submits that, if such use does not give rise to tax situs outside of Pennsylvania under due process, tax situs outside of Pennsylvania *cannot be established by classification*. The freight cars so used either have, or do not have, a tax situs outside of Pennsylvania. Whether the owning railroad does or does not have trackage outside of Pennsylvania makes no difference in respect to freight cars of the owner used on the *lines of other* railroads outside of Pennsylvania. In either situation, the railroad owner must be treated the same. It is the denial of apportionment to appellant that creates the discrimination. See note 5 to Mr.

Justice Stone's dissenting opinion in the *Northwest Airlines* case (322 U. S. 294) which contains an analysis of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905) where it is said, at page 325:

> "Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state."

The inference here is that, if the tax of the domiciliary state on tank cars running regularly and continuously to and from the domiciliary state were not apportioned, the owner of the tank cars would be discriminated against by the apportioned tax on railroads with trackage extending beyond the domiciliary state.

In the case of railroads having lines in and out of Pennsylvania, the trackage ratio apportionment has never been applied to rolling stock having a domiciliary situs and not used over the trackage owned; and there is no authority holding that the trackage ratio must be applied in such a case.

Actually, since the lower court opinion in the instant case, the Pennsylvania tax authorities, in making tax settlements against railroads having trackage in and out of the state, have denied apportionment for their freight cars while on the lines of other railroads outside of Pennsylvania. Counsel for appellant has personal knowledge of this fact.

This practice is a recognition of the error of the Commonwealth's and this Court's position in the instant case, and is further a recognition that the "red herring" of classification cannot cure the discrimination against appellant in the instant case.

Appellant respectfully submits, therefore, that the unapportioned tax on its freight cars is invalid on the ground of discrimination.

V. Conclusion

For the reasons stated above, it is respectfully requested that this Court grant reargument to appellant in the instant case in respect to that portion of its Opinion affirming the judgment of the court below. Attached hereto is a copy of the Court's opinion filed in this case on April 17, 1961.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
Attorneys for Appellant

Order Entered on Petition for Reargument.

May 25, 1961, petition for reargument denied.

PER CURIAM.

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In The
Supreme Court of the United States

October Term, 1961
No. 400

CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 400

CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

MOTION TO DISMISS APPEAL

Appellee moves that the appeal from the final judgment of the Supreme Court of Pennsylvania in the present case be dismissed on the ground that the appeal does not present any substantial Federal questions.

STATEMENT

In the present case, the courts below[1] sustained the imposition of the Pennsylvania Capital Stock Tax against the appellant for 1951.

The appellant is a domestic railroad corporation, incorporated under the laws of Pennsylvania, and domiciled in Pennsylvania. It has no railroad tracks outside Pennsylvania, and thus does none of its railroad business, i.e., transportation by rail for hire, outside Pennsylvania.

The Pennsylvania Capital Stock Tax[2] is a tax upon the property and assets of a domestic corporation[3]. So much of the capital stock of the corporation as is represented by real estate or personal property of a corporeal nature located in another state and used in the operations of the corporation outside Pennsylvania is exempt, but such personal property will be taxable in Pennsylvania as the domiciliary state if it is not permanently located outside the State[4].

The appellant is seeking an exemption from the imposition of capital stock tax for its freight cars tem-

[1] 71 Dauphin County Report 348 (1958); 180 Pa. 403 Pa. 519, 164 A. 2d 878 (1960). Jur. St. Appendix B, pp. 25-33.

[2] §§20 & 21 (a) of the Act of June 1, 1889, P. L. 420, as amended, 72 P.S. §1901, 1871, Jur. St. Appendix A, pp. 23, 24.

[3] *Commonwealth v. Union Shipbuilding Co.*, 271 Pa. 403, 405, 114 A. 257 (1921).

[4] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

porarily outside Pennsylvania during the tax year while being used by other railroads on their own lines.

The court below held that the appellant's freight cars "which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile * * * have not attained a tax situs outside Pennsylvania" and therefore were subject to a capital stock tax at full value.[3]

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[3] Jur. St. pp. 32, 33.

QUESTIONS PRESENTED

1. In imposing capital stock tax upon the property of a domestic railroad corporation having no tracks outside Pennsylvania, must the Commonwealth exempt the railroad's freight cars temporarily outside Pennsylvania which, being on lines of other railroads, had not acquired an actual situs in any other state?

2. Has the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated states, sustained its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax?

3. Did the refusal of the taxing departments to grant appellant a property allocation for rolling stock on tracks of other railroads outside Pennsylvania violate equal protection because other railroads having tracks both inside and outside of Pennsylvania had received an allocation for rolling stock, based on track miles in Pennsylvania over track miles everywhere?

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania which held that the appellant's freight cars which were temporarily outside Pennsylvania on lines of other railroads had not acquired a tax situs outside Pennsylvania, and were therefore not exempt from the Pennsylvania Capital Stock Tax imposed on domestic corporations.

The right of the domiciliary state to include in the measure of the tax such meandering freight cars was upheld by this Court in *New York Central R. R. (etc.) v. Miller*[6]. The ruling of that case has never been modified or overruled. Therefore, the present appeal does not present a substantial Federal question of due process or interstate commerce.

Subsequent decisions relied upon by the appellant involving airlines and barge companies do not apply to the instant situation, because in all of those cases the taxpayer was itself operating its own equipment on its own routes outside the taxing jurisdiction and was therefore subject to taxation in such outside states. In the present case, the appellant had no tracks outside Pennsylvania, operated no trains outside Pennsylvania and paid no taxes on its property or franchises to any other state.

Moreover, the appellant, by merely showing that a certain number of its unidentified freight cars were

[6] 202 U.S. 584 (1906).

temporarily outside Pennsylvania on other railroads in undesignated states, did not sustain its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax.

Finally, in granting a track mileage exempt ratio for the freight cars of railroads having tracks inside and outside of Pennsylvania, the Commonwealth did not discriminate against appellant, which had no tracks outside Pennsylvania. Thus, this classification, held reasonable by the courts below, does not present a substantial Federal question of equal protection.

ARGUMENT

I. PENNSYLVANIA, THE STATE OF INCORPORATION, MAY TAX ALL OF APPELLANT'S ROLLING STOCK EXCEPT THAT HAVING AN ACTUAL SITUS OUTSIDE PENNSYLVANIA

It is a well-established principle of law that the legislative power of every state applies to all property within its borders. For centuries personal property has been regarded as subject to the law of the owner's domicile, as expressed in the maxim *mobilia sequuntur personam*[7].

The maxim still applies to property temporarily outside the taxing jurisdiction of the domiciliary state, if the property has not acquired an actual or permanent situs elsewhere[8].

In *Southern Pacific Company v. Kentucky*[9], in upholding a state property tax on a fleet of steamships owned by a domestic corporation but permanently employed on the high seas, this Court said:

> "* * * The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the

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[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 22 (1891).

[8] 84 C.J.S., *Taxation*, §115, p. 226; 110 A.L.R. 707, 713; L.R.A. 1915 C, p. 908; *Commonwealth v. Universal Trades, Inc.*, 392 Pa. 323, 333; 141 A. 2d 204, 209 (1958); cert. den., 358 U.S. 129, 938.

[9] 222 U.S. 63, 68 (1911).

> owner for purposes of taxation has its foundation in the *protection which the owner receives from the government of his residence.* * * * "

(Emphasis supplied.)

Likewise, in *Greenough v. Tax Assessors*[10], this Court, summarizing this rule, said:

> "* * * And, where the taxable property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles *because the corporation exists under the law of its domicile.*"

(Emphasis supplied.)

An analysis of the decisions of this Court shows a pattern of permitting the state of the corporation's domicile to tax its tangible personal property, unless the taxpayer can shew an actual situs elsewhere for such property.

In *Union Transit Company v. Kentucky*,[11] this Court refused to permit the domiciliary state to tax such property as was definitely located "wholly and exclusively within the jurisdiction of another state".

In *New York Central R. R. (etc.) v. Miller*,[12] after citing the *Union Transit Company* case, this Court agreed that such property could not be taxed if it were permanently outside of the State, but permitted the domiciliary state to tax the rolling stock of the railroad corporation, because it did not appear that any specific cars or any average of cars were so continu-

[10] 331 U.S. 486, 491 (1946).
[11] 199 U.S. 194 (1905).
[12] 202 U.S. 584 (1906).

ously in any other state as to be taxable there; and the absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. This decision was relied upon by the court below in the instant case[13].

The court below had previously followed the permanent location test for tax situs, and also the test of non-taxability elsewhere[14].

In *Northwest Airlines, Inc. v. Minnesota*,[15] this Court explained what it meant by property permanently situated in a state other than the domicile, i.e., "continuously throughout the year, not a fraction thereof, whether days or weeks".

In *Standard Oil Co. v. Peck*,[16] this Court permitted the taxpayer to show that its vessels were continuously outside of the domiciliary state; but this was done to permit taxation on an apportionment basis, in order to avoid multiple taxation of interstate operations. But in the present case, there can be no multiple taxation, because appellant operated no trains outside of Pennsylvania (185a).

The appellant did not pay corporation taxes in any other state (49a). The other states through which the appellant's cars were passing while being operated and used by other railroads, would have had no power

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[13] Jur. St. pp. 29, 32.

[14] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[15] 322 U.S. 292 (1944).

[16] 342 U.S. 382 (1952).

to impose taxes on the appellant measured by such cars. See *Commonwealth of Kentucky v. Union Pacific R. Co.*,[17] where the court held that Kentucky could not impose a tax on a foreign railroad as to its freight cars which were being operated within the state by a local railroad under a per diem lease agreement like the one used in the present case.

The decisions in *Ott v. Mississippi Valley Barge Line Co.*,[18] *Braniff Airways, Inc. v. Nebraska State Board*,[19] and *Flying Tiger Line, Inc. v. The County of Los Angeles*,[20] did not repudiate the test for apportionment, set forth in the *New York Central* case, i.e., that the rolling stock must be so continuously in another state as to be taxable there. Furthermore, these decisions are distinguishable from the present case and the *New York Central* case because each of the taxpayers in those cases was engaged in carrying on its own business through the use of its own equipment within the non-domiciliary taxing state.

Therefore, the appellant's freight cars were correctly allocated to Pennsylvania for capital stock tax purposes, because (a) appellant is a Pennsylvania corporation and domiciled in Pennsylvania (39a); (b) none of its freight cars had acquired a fixed or taxable situs outside Pennsylvania; and (c) all of appellant's freight cars outside of Pennsylvania were being operated by other railroads on the trains and tracks of such other railroads and for the business of such other railroads.

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[17] 214 Ky. 330, 283 S.W. 119, 122, 123 (1926).

[18] 336 U.S. 169 (1949).

[19] 347 U.S. 590 (1954).

[20] 51 Cal. 2d 314; 333 P. 2d 323 (1958), cert. den., 359 U.S. 1001.

II. APPELLANT HAS NOT SHOWN THAT ANY OF ITS ROLLING STOCK ACQUIRED A SITUS IN ANY STATE OUTSIDE PENNSYLVANIA

The evidence does not sustain the appellant's burden of proving that any of its freight cars temporarily outside Pennsylvania on the lines of other railroads had acquired an actual situs in any other specific state during 1951.

Appellant apparently proceeded on the premise that all it had to prove at the trial was that certain unidentified rolling stock was absent from Pennsylvania during a portion of the year. Assuming that the evidence showed this (negatived infra), it was not sufficient to establish a fixed situs in a geographical location in a particular state outside Pennsylvania.

The mere presence of the appellant's freight cars in some other unidentified state, wherever it may be, and for however brief a time, would not give that state tax jurisdiction. Tax situs cannot be determined by the number of days spent by an undesignated number of cars on a given railroad whose tracks may pass through one or more such states.

Appellant is a member of the "Association of American Railroads". Under a "Car Service and Per Diem Agreement" (Exhibit "X") entered into by members of the Association, the owning railroad was paid a per diem rate ($1.75) for its freight cars while on the lines of other subscribing railroad mem-

bers and on the lines of non-subscribing railroads. In the latter event, the forwarding subscriber was responsible to the owning subscriber for the per diem rate accruing on the car while on such non-subscribing road. Reports were required from the using subscriber to the owning subscriber (49a, 50a, 143).

In construing Exhibit "X", the Trial Court found as a fact, at the request of the Commonwealth, that when appellant's freight cars were employed on the lines of other railroads, they were under the sole operation and control of such other railroads, and not subject to the control of the appellant (167a).

The appellant has attempted to establish a tax situs for its rolling stock in other *states* by showing the number of car hire days on other *railroads* (Exhibit "Y", 163a, 144a). Obviously, these statistics can bear no relation to the physical location of the cars, especially where the railroads which are operating the cars have tracks in more than one state.

No attempt has been made to trace the path of any specific car during 1951. Appellant bases its claim for an apportionment ratio on the statistics contained in Exhibit "Y" of the Stipulation of Facts, as summarized on statement "Y 6" (144a). But this shows that the allocation of appellant's freight cars was based entirely on theoretical averages, and not on any information regarding the physical location of such cars.

Since Exhibit "Y" relates only to car hire days on *railroads* outside Pennsylvania rather than in *states* outside Pennsylvania, it can have no bearing on tax situs. Similarly, Exhibit AA (146a-157a) can

have no significance, because it is based upon the per diem car hire paid by specific railroads (52a, 53a).

The appellant was doing all of its business in Pennsylvania. Its business was operating a railroad. All of its tracks were in Pennsylvania. When its freight cars were outside Pennsylvania, they were being operated by other railroads on their lines in their railroad business, and not in the railroad business of the appellant.

Exemptions from taxation are strictly construed against the person or corporation claiming such exemption.[21] The appellant has failed to prove that any specific cars had acquired a situs outside of Pennsylvania during 1951, or had even been continuously absent from Pennsylvania during that year.

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[21] §58 (5) of the Pennsylvania Statutory Construction Act, 46 P.S. §558; *Commonwealth v. Sunbeam Water Co.*, 284 Pa. 180, 188, 130 A. 405 (1925); *Hale v. State Board of Assessment and Revision*, 302 U.S. 95, 103 (1937).

III. NO LACK OF EQUAL PROTECTION

The appellant contends that the tax in question violated the equal protection clause of the Fourteenth Amendment, because certain railroad companies having railroad track mileage inside and outside Pennsylvania received a mileage allocation against the rolling stock; whereas the appellant having no track mileage outside Pennsylvania did not receive such a mileage allocation.

A number of railroads which have track mileage inside and outside of Pennsylvania are consolidated railroads, i.e., railroads which have been domesticated in a number of different states.[5] In taxing such railroads domiciled in several states, the principle of *mobilia sequuntur personam* could be applied only on an apportionment basis; and there would be no other way to tax its rolling stock.

Any domestic railroad corporation which had tracks in other states would be entitled to such an allocation, because it was running trains in such other states, i.e., conducting its railroad business there. Thus, the rolling stock apportioned in such other states on a mileage basis would have a business and a tax situs outside of Pennsylvania. This situation

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[5] See *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 105 A. 2d 330 (1954), cert. den., 348 U.S. 850; *Commonwealth v. N. Y. C. & St. L. R. R. Co.*, 354 Pa. 388, 47 A. 2d 272 (1946), app. dis., 329 U.S. 682; *Fidelity Philadelphia Tax Case*, 354 Pa. 355, 47 A. 2d 267 (1946).

does not apply to the appellant, because none of its cars or locomotives are engaged in its railroad operations when outside of Pennsylvania, but are being used by other railroads in their operations.[23]

Furthermore, the capital stock tax reports filed by railroads having track mileage inside and outside Pennsylvania did not indicate that the rolling stock to which the track mileage ratio was being applied included freight cars for which they received per diem car hire while on the lines of other railroads (55a). In other words, the alleged discrimination, if any, would have been due to the imperfect knowledge of, or lack of notice to, or lack of inquiry by, the taxing officers, and would not constitute a violation of equal protection.[24]

Moreover, the railroads having track mileage inside and outside Pennsylvania paid franchise or property taxes to the other states in which a portion of their railroad track mileage was located (54a, 55a, 251), whereas the appellant was not qualified or authorized to do business in any other state than Pennsylvania, and did not pay franchise or property taxes to states other than Pennsylvania (49a, 12).

Therefore, the court below properly held[25] that the tax settlement did not violate equal protection of the law.

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[23] *See Commonwealth of Kentucky v. Union Pacific R. R. Co.*, supra, Note 16 (283 S.W. 1191).

[24] *Lizzett Co. v. Lee*, 288 U.S. 517, 540 (1933); *Commonwealth v. Koppers Co., Inc.*, 397 Pa. 523, 532, 156 A. 2d 328 (1959), app. dis., 364 U.S. 286 (1960).

[25] Jur. St. p. 33.

For these reasons the Commonwealth's Motion To Dismiss the appeal in the present case for lack of substantial Federal questions should be sustained.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

An analysis of appellant's Statement of Jurisdiction and of appellee's Motion to Dismiss Appeal reveals the basic issues to be (1) how does "permanent situs" of movable tangible property (appellant's freight cars), apart

from owner's domicile, arise; (2) does "permanent situs" in non-domiciliary state depend upon doing of business by appellant therein; (3) has appellant met burden of proof of non-domiciliary "permanent situs" or substantial regularity of absence from domiciliary state; and (4) does recognition of non-domiciliary "permanent situs" in case of railroads having trackage outside of Pennsylvania and non-recognition in case of appellant having no trackage outside of state discriminate against appellant?

(1) Appellant and Appellee invoke conflicting rules to establish "permanent situs" of movable tangible property.

The parties agree that the domicilary state has power and jurisdiction to levy a property tax on movable tangible property unless it has acquired a non-domiciliary permanent situs. Whether appellant's freight cars under a per diem rental on the lines of other railroads have acquired a non-domiciliary permanent situs depends upon the rule to be applied as developed by this Court.

Appellee makes no distinction between appellant's freight cars run on fixed routes and regular schedules in and out of Pennsylvania and its freight cars *not* run on fixed routes and regular schedules on the lines of other railroads outside of Pennsylvania under a per diem rental. We have established the unanimity of the decisions in holding that a proportion of appellant's freight cars run on fixed routes and regular schedules acquired a permanent situs outside of Pennsylvania.[1] On this point, appellee's Motion to Dismiss must be denied.

As to appellant's freight cars under a per diem rental, the facts are stipulated by the parties that these cars (3074) ran regularly, habitually and continuously on the lines of

[1] Jur. Stat., p. 17.

other railroads to and from Pennsylvania and in other states and that such cars were physically absent from Pennsylvania 71% of the time.[2] Appellee contends[3] that none of appellant's freight cars acquired a permanent situs outside of Pennsylvania because no *specific* unit or units were *continuously* outside of Pennsylvania *throughout the entire tax period*. This rule was developed by this Court in respect to vessels operating on the high seas[4] and was applied by it in two cases involving other types of transportation equipment, the one, freight cars not running on fixed routes and schedules,[5] and the other, involving airplanes running on fixed routes and regular schedules.[6] These two cases are relied upon exclusively by appellee in the instant case.[7] This rule was rejected by this Court in its application to vessels operating on inland waters in 1948.[8] The *Northwest case* was modified or overruled in a case in 1952 involving tow boats, barges and vessels not running on fixed routes and regular schedules,[9] and in a case in 1954 involving airplanes run on fixed routes and regular schedules.[10] This is recognized by the Supreme Court of Pennsylvania in the instant case.[11] Appellee, as did the State Court, must rely entirely upon the *New York Central Case*. The old rule in that case was applied in the instant case by the State Court because there has been no subsequent decision of this Court involving railroad rolling stock while on the lines of other railroads under a per diem

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[2] Jur. Stat., p. 10, and items (4) (b) and (5).
[3] Motion to Dismiss, pp. 8, 9.
[4] Jur. Stat., p. 20.
[5] *New York Central R.R. (etc.) v. Miller*, 202 U.S. 584 (1906).
[6] *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292 (1944).
[7] Motion to Dismiss, pp. 5, 8, 9.
[8] *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).
[9] *Standard Oil Co. v. Peck*, 342 U.S., 382 (1952).
[10] *Braniff Airways Inc. v. Nebraska State Board*, 347 U.S. 590 (1954).
[11] Jur. Stat., pp. 31, 32.

rental. Appellant has distinguished that case.[12] It conflicts with the rule now applied by this Court to all types of transportation equipment except vessels operating on the high seas.

Concurrent with the development of the rule applicable to vessels operating on the high seas, and subsequently, this Court has developed the average unit property tax apportionment rule. Where an owner has a fleet or a number of units of transportation equipment moving about among the states regularly and constantly, the rule holds that an average number of units, although not the same units but changing as the situation may require, acquires a permanent situs in a given state based upon regularity of movement, employment or physical presence in that state.[13] Permanent situs of an average number of units is determined by apportionment on the basis of time, mileage or gross earnings ratio, or a combination of factors. The types of equipment to which this rule is applied are tow boats, barges, vessels, refrigerator and tank cars, pullman palace cars and airplanes. Some ran on fixed routes and schedules and others did not. Under this rule the constitutional test of a state's jurisdiction and power to tax depends upon the relation between the tax and protection, opportunities and benefits afforded by the laws of the taxing state.

Where the units of transportation equipment are substantially, or almost continuously, absent from the domiciliary state as in the instant case, this Court, *without requiring proof of permanent situs in specific non-domiciliary states*, has applied the rule in order to limit the domiciliary state under due process to an apportioned tax having relation to opportunities, protection and benefits afforded by it.[14]

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[12] Jur. Stat., pp. 20, 21.
[13] Jur. Stat., cases cited in Notes 6, 7, 8, 9, 10, pp. 18, 19.
[14] Jur. Stat., cases cited in Note 10, p. 19.

In disregard of the stipulated fact as to the regularity and continuity of the movement of appellant's freight cars on the lines of other railroads, both the State Court and appellee arbitrarily apply the descriptive term "meandering" to such movement which is no more "meandering" than in the case of tow boats, barges, vessels, refrigerator and tank cars.

Appellant submits that the average unit rule of property tax apportionment of this Court is applicable to the domiciliary state in the instant case; that this rule conflicts with the old rule in the *New York Central case;* and that, therefore, a substantial federal question is presented.

(2) Permanent situs of transportation equipment in a non-domiciliary state does not depend upon the doing of business by the owner in such state.

Appellee, but not the Supreme Court of Pennsylvania, seeks to distinguish certain of the cases applying the average unit rule of property taxation[15] on the general ground that the owners of the transportation equipment used the equipment in their own business, but appellee is careful not to include in this distinction the refrigerator and tank car cases. In those cases, the owners leased the cars to shippers who in turn used the cars in their business on the lines of railroad, and in those cases regularity of movement and physical presence of the cars within a given state were held to make them subject to property taxation *to the owner.* In these cases, therefore, the doing of business by the owner in a given state is not a condition precedent to the property taxation of the cars in that state. Accordingly the distinction sought to be made by the appellee is invalid.

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[15] Motion to Dismiss, p. 10.

(3) Appellant has met the burden of proof of non-domiciliary permanent situs or substantial regularity of absence of its freight cars outside of the domiciliary state.

The stipulation of fact in the Record that appellant's freight cars were run regularly, habitually and continuously on the lines of other railroads outside of Pennsylvania, the list of the names of such railroads, and the number of days that appellant's freight cars were on the lines of such railroads (R. 133a-144a) constitute sufficient evidence, or indicate that sufficient evidence could be obtained, to enable any foreign state to levy apportioned property tax upon appellant's freight cars used in such state.

The Record establishes that appellant's freight cars were on the lines of other railroads outside of Pennsylvania 71% of the time.[16] This constitutes substantial and almost continuous absence from Pennsylvania. Under similar circumstances, this Court has invoked the average unit rule of property tax apportionment, without identifying and requiring proof of, the foreign states having power to tax, to prohibit the domiciliary state from levying an unapportioned property tax.[17] The same application of these rules is applicable in the instant case.

(4) Recognition of non-domiciliary permanent situs of freight cars while on the lines of other railroads under a per diem rental in the case of owning railroads having trackage outside of Pennsylvania and non-recognition in case of appellant having no trackage outside the state discriminates against appellant.

If freight cars of the owning railroad while on the lines of other railroads under a per diem rental do not acquire a permanent situs apart from the domicile of the owner,

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[16] Jur. Stat., p. 10.

[17] *Union Refrigerator Transit Company v. Kentucky*, 199 U.S. 194 (1905), *Standard Oil Company v. Peck*, 342 U.S. 382 (1952).

then the mere fact that the owning railroad has trackage outside of the domiciliary state or is domesticated in more than one state does not bring into being a non-domiciliary situs for the freight cars of the owning railroad while on the lines of other railroads under a per diem rental. Therefore, property tax apportionment of the freight cars of such railroad while on the lines of other railroads and the denial of similar apportionment to appellant discriminates against appellant.

WHEREFORE, appellant prays that appellee's Motion to Dismiss Appeal should be denied; and that this Court should note jurisdiction to allow plenary consideration, with briefs on the merits and oral arguments.

Respectfully submitted,

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Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANT

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Appellee.

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (R. 209-216) is reported at 403 Pa. 419, 169 A. 2d 878. The opinion of the Trial Court entering judgment *nisi* (R. 180a-187a) is reported in 71 Dauphin County Reporter 348. The Trial Court's opinion overruling exceptions (R. 204a, 205a) is not included in the Official Reporter.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered April 17, 1961 (R. 209, 216); and appellant's Petition for Reargument was denied on May 25, 1961 (R. 239). Notice of Appeal to this Court was filed in the Supreme Court of Pennsylvania on July 14, 1961 (R. 240, 241). The jurisdiction of this Court rests on 28 U.S.C. 1257 (2) and (3) and 2103.

STATUTE INVOLVED

The validity of Sections 20 and 21(a) of the Act of June 1, 1889, Pamphlet Laws 420, as amended, as of the tax year involved in this case (72 Purdon's Pennsylvania Statutes, Sections 1871 and 1901), as construed by the Supreme Court of Pennsylvania, is involved (Appendix A).

Section 20 requires Pennsylvania Corporations to make an annual report to the Department of Revenue on a form prescribed by that Department and to include therein, *inter alia:*

> "Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.
>
> "Sixth. A valuation and appraisal * * * of the capital stock of the said corporation * * * at its actual value in cash as it existed at the close of the year for which the report is made."

Section 21(a) provides:

> "That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon the actual value of its whole capital stock of all kinds,* * * as ascertained in the manner prescribed in the said twentieth section: * * *."

The nature of the tax is not in dispute. It has conclusively been held, without dissent, to be a tax on property and assets of Pennsylvania Corporations as represented by capital stock value. It has been before this Court in a prior case and has been construed as not intending to reach property located or having a situs outside of the Commonwealth.[1]

The Act of June 22, 1931, Pamphlet Laws 685 (Appendix A) prescribes the formula to be used to exclude non-taxable and exempt assets, such as tangible property having a situs outside the state and United States securities. The amount of such assets is deducted from total assets. The ratio of the remaining assets to total assets is applied to the whole capital stock value.

In the instant case on appeal, there is involved the issue of exclusion of the following assets which appellant contends had a situs outside of, or were substantially absent from, and used outside of, the domiciliary state and, therefore, were beyond its taxing power and jurisdiction:

$525,765.71—Average of 158 freight cars run on fixed routes and regular schedules over railroad lines outside of Pennsylvania (Stipulation of Facts, Par. 14, R. 50a and Exhibits Y-2 and Y-5, R. 131a, 134a).

$7,282,523.00—Average of 2189.23 freight cars run regularly, habitually and continuously on the lines of *other* railroads outside of Pennsylvania (S. F. Pars. 13, 15 and 16, R. 49a, 50a, 51a and Exhibits Y-2, Y-3, Y-4, Y-5 and Z, R. 131a-143a, 154a).

QUESTIONS PRESENTED

1. Did an average number of appellant's freight cars run under an Operating Agreement on fixed routes and regular

[1] *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905); *Commonwealth v. Delaware, Lackawanna & Western R. R. Co.*, 145 Pa. 96, 22 A. 157 (1891).

schedules over railroad lines to and from Pennsylvania, the domiciliary State and did an average number of its freight cars run habitually, regularly and continuously on railroad lines to and from, or wholly outside, such state, under a Car Service and Per Diem Agreement, obtain a permanent situs outside the domiciliary state; and, if so, does the unapportioned tax thereon violate the due process provisions, and the Commerce Clause, of the Federal Constitution?

2. Does the unapportioned property tax violate the equal protection of the laws provisions of the Federal Constitution when apportionment is denied to appellant, having no trackage outside the state, and is allowed to other railroads with trackage in and out of the state, for freight cars while on the lines of using railroads outside of Pennsylvania under a Car Service and Per Diem Agreement?

STATEMENT OF THE CASE

The Pennsylvania Department of Revenue assessed the unapportioned capital stock or property tax for the year 1951 (1) on appellant's diesel locomotives and freight cars run on fixed routes and regular schedules over railroad lines to and from the state and (2) on freight cars run habitually, regularly and continuously on railroad lines to and from, or wholly outside, the state. (S F, Pars. 20, 21, R. 53a, 54a, Exhibit BB, R. 158a, 10a, 11a). Appellant challenged the assessment (R. 3a-7a) under the due process clause of the Fourteenth Amendment of the Federal Constitution on the ground that an average number of diesel locomotives and freight cars had their situs outside of Pennsylvania, the domiciliary state, or were continuously absent from and habitually employed outside the state and hence that the state did not have jurisdiction to tax them; and under the Commerce Clause of the Federal Constitution, on the ground that such average number was exposed to multiple state taxation. The Trial Court sustained the assess-

ment (R. 187a, 205a). The Supreme Court of Pennsylvania reversed the Trial Court and modified the assessment on diesel locomotives (R. 215, 216) but affirmed the Trial Court and sustained the assessment on freight cars (R. 216). The appeal to this Court is limited only to the unapportioned tax assessment on appellant's freight cars.

(1) History of the Case

The facts in the Record have been stipulated by the parties (Stipulation of Facts, Commonwealth's Exhibit No. 8, R. 38a-57a and Exhibits attached thereto, R. 58a-161a).

Appellant, a Pennsylvania Corporation, was incorporated in 1914 for the purpose of "constructing, maintaining and operating a railroad for public use in conveyance of persons and property" (S/F, Par. 2, R. 38a). All of its capital stock was owned by The Central Railroad Company of New Jersey Corporation, hereinafter referred to as CNJ (S/F, Par. 3, R. 38a).

The railroad operated by appellant extended from the anthracite region in Pennsylvania (Scranton and Wilkes-Barre) to the Pennsylvania-New Jersey border at Easton (Pa.) where it connected with the railroad lines operated by CNJ to Jersey City and points along the North Jersey Coast. Appellant's total mileage (owned and leased—all in Pa.) was 206.74: 123.47 main line and 83.27 branch (S/F, Par. 4, R. 38a).

There are two separate and distinct types of use of appellant's railroad equipment in the instant case, the one under the Operating Agreement between appellant and CNJ and the other under the Car Service and Per Diem Agreement of the Association of American Railroads.

(a) The Operating Agreement

Prior to August 5, 1946, CNJ operated its railroad lines in New Jersey and it operated, *also*, under lease or sub-lease

the railroad lines from Easton to Scranton and Wilkes-Barre in Pennsylvania. On August 5, 1946, appellant, with the consent of the Interstate Commerce Commission (I.C.C.), terminated the leases and subleases to CNJ of the railroad lines in Pennsylvania and took over their operation in Pennsylvania, and the parties (Appellant and CNJ) entered into an Operating Agreement *in order to continue the existing through freight and passenger service over their respective lines*. This Agreement provided that each party "shall operate such through service" over their respective lines; that "each party shall furnish its fair share of locomotives and other equipment necessary to operate such service"; and that "whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and operated by such other party until returned to the former's lines" (S. F. Par. 5, R. 38a-40a, Exhibit A, R. 58a-65a).

Pursuant to this Agreement, appellant's diesel locomotives and freight cars, in the course of *through* freight shipments originating on its own lines in Pennsylvania or on the lines of CNJ in New Jersey, were run *on fixed routes and regular schedules* in and out of Pennsylvania over its own lines in Pennsylvania and over the lines of CNJ in New Jersey and, for such use, appellant received a division of freight revenues, a mileage rate for its locomotives, and a per diem rental for its freight cars while on the lines of CNJ (S. F. Pars. 14 and 18, R. 50a, 52a; Exhibit A, Sections 2, 5 and 8, R. 60a, 61a).

The mileage ratio of diesel freight locomotives (30 units) was 56.5523% in Pennsylvania and 43.4477% outside of Pennsylvania; and this mileage ratio applied to the average value of such locomotives results in an apportionment of average value of $1,908,381 or an average of 17 locomotives to Pennsylvania and an average value of $1,466,160 or an average of 13 locomotives outside of Pennsylvania (S. F.

Par. 18, R. 52a; Exhibit Z, R. 145a). This apportionment was allowed in the portion of the decision of the Supreme Court of Pennsylvania *modifying* the judgment of the Trial Court and is not at issue in the instant appeal.

Appellant owned 3074 freight cars during the year 1951, having an aggregate average net book value of $10,225,769 or an average net book value per car of $3,326.53 (S. F. Pars. 15 and 16, R. 50a, 51a; Exhibits Y-2 and Z, R. 131a, 145a). The number of cars times 365 days in the year produces total car days of 1,122,010 for the year. Appellant's freight cars were on the lines of CNJ *under the Operating Agreement* for 57,589 car days (S. F. Par. 15, R. 50a, 51a; Exhibits Y-2 and Y-5, R. 131a, 134a). The average number and value of cars thus run on the lines of CNJ are determined by the ratio of $\frac{57,589}{1,122,010} \times \$10,225,769 = \$525,765.71$ average value divided by $3,326.53 = 158$ average number. *This apportionment was denied by the Supreme Court of Pennsylvania and is at issue in this appeal.*

(b) Car Service and Per Diem Agreement

The Interstate Commerce Act of 1920, as amended, 49 U.S.C.A. Section 1, Pars. 9-14, requires, *inter alia*, railroads to interchange freight and passenger cars in order to provide rapid and efficient through interstate movement of freight and passengers as compared with prior practice of transfer from cars of one railroad to the cars of another.

Appellant is a member of the Association of American Railroads. Under the "Car Service and Per Diem Agreement" entered into by members of the Association pursuant to said Act of 1920, the owning railroad is paid a per diem rate of $1.75 for its freight cars while on the lines of other subscribing members and on the lines of non-subscribing railroads (S. F. Par. 13, R. 49a, 50a; Exhibit X, R. 130a).

It is stipulated by the parties in the instant case that appellant's freight cars, interchanged with subscribing

members under the Agreement, *were habitually, regularly and continuously employed on the lines of such other railroads* operating wholly within Pennsylvania, operating within and without Pennsylvania, and operating wholly without Pennsylvania (8 F, Pars. 13 and 15, R. 49a, 50a, 51a; Exhibits Y-2, Y-3, Y-4 and Y-5, R. 131a-153a).

The car day ratio applied to appellant's total freight cars (3074) produces the following results (8 F, Pars. 13 and 15, R. 49a, 50a; Exhibits Y-2, Y-3, Y-4, Y-5, Y-6, Z, AA-1, AA-2, AA-3 and AA-4, R. 131a-157a):

	Car Days	*Percentage*	*Location of Using Railroad*	*Average Value*	*Number of Units*
(1)	104,479	.0931	Appellant—Pa.	952,186	286.24
(2)	57,689	.0514	CNJ—Out of Pa.	525,766	158.09
(3)	25,321	.0225	Others—All Pa.	230,696	69.47
(4)	386,532	.3445	Others—In and Out Pa.	3,522,762	1,058.99
(4)(a)	135,455	.120725	In Pa.	1,234,475	371.10
(4)(b)	251,077	.2238	Out Pa.	2,288,529	687.96
(5)	547,989	.4884	Others—All out Pa.	4,994,253	1,501.34
	1,122,010	.9999		10,225,063	3,074.04

(1) Regular routes and fixed schedules—Operating Agreement.

(2) Regular routes and fixed schedules—Operating Agreement.

(3) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

(4) (a) and (b) Breakdown of item (4)—Car Service and Per Diem Agreement.

(5) Regular, habitual and continuous use—Car Service and Per Diem Agreement.

At issue also, in the instant appeal is the denial by the Supreme Court of Pennsylvania of apportionment outside of Pennsylvania of average freight cars of 2189.30 (items 4 (b) and 5, average value $7,282,773) on lines of other railroads outside of Pennsylvania under the Car Service and Per Diem Agreement.

There is no direct evidence in the Record establishing the number of car days and the average number of freight cars in specified foreign states. The Record does establish

the name of, and number of car days on, using railroads and whether the using railroad operated wholly in Pennsylvania, in and out of Pennsylvania, or wholly outside of Pennsylvania (S F, Par. 15, R. 50a, 51a; Exhibits Y-3, Y-4 and Y-5, R. 132a-143a); and the proportion of the "road miles" in and out of Pennsylvania of those using railroads operating in and out of Pennsylvania (S F, Par. 15, R. 51a; Exhibit Y-4, R. 133a). The Record establishes further that based on a detailed examination, study and review by appellant of its records and reports made to it by using railroads for the month of March, 1951, 1024 freight cars were *at all times* during that month on roads operating wholly outside of Pennsylvania; 2049 cars were at some time during the month on roads operating within and without Pennsylvania; and 1 car was at all times on roads operating wholly in Pennsylvania; and that in the best opinion and judgment of appellant, such situation represented the average use and employment of its freight cars on the lines of other railroads at all times throughout the year 1951 (S F, Par. 17, R. 51a, 52a).

(2) Business Offices Operations Qualification

Appellant's domiciliary office at Mauch Chunk, Pennsylvania, was relatively insignificant. Under the said Operating Agreement, appellant maintained joint offices and had operating and administrative personnel *with CNJ* at Jersey City, New Jersey and New York City where its nine operating departments, which conducted its railroad operations, were located, and where collections of revenue and disbursement of expenses were made (S F, Pars. 7, 8, 9, 10 and 11, R. 40a-49a; Exhibits A, C to W inc., R. 58a-65a, 67a-129a). Appellant, also, occupied off-line freight offices with CNJ at Albany, Buffalo, Cleveland, Boston, St. Louis, Detroit, Pittsburgh and Wilkes-Barre (S F, Par. 11, R. 49a).

During 1951, appellant was not qualified or authorized to do business in any state other than Pennsylvania; nor did

it pay franchise or property or other taxes to states other than Pennsylvania except in respect to wages of joint employees at Jersey City and New York City (S F, Par. 12, R. 49a).

(3) Profit Under Car Service and Per Diem Agreement

For its freight cars used on the lines of CNJ under the Operating Agreement and for its freight cars used on the lines of other railroads under the Car Service and Per Diem Agreement, appellant received car hire of $100,955.75 (S F, Par. 19, R. 52a, 53a; Exhibit AA-3, R. 148a) and $1,679,723.50 (S F, Par. 19, R. 52a, 53a; Exhibits AA-1, AA-2, AA-3 and AA-4, R. 146a-157a) respectively or aggregate car hire of $1,780,679.25 (S F, Par. 19, R. 52a, 53a). This represents a gross return of 17.6% on appellant's average investment of $10,225,769 in freight cars.

(4) Apportionment Under Tax Practice

In assessing the capital stock or property tax against other domestic railroad corporations whose railroad lines extended beyond the state, the tax was apportioned based upon the ratio of track mileage outside of the state to total track mileage. This apportionment included freight cars used on the lines of other railroads under the Car Service and Per Diem Agreement. Appellant's freight cars were used on the lines of other railroads under the same Agreement under the same circumstances and for the same consideration and in the tax assessed against it for the year 1951 no apportionment on any basis was made for its freight cars so used. (S F, Par. 25, R. 54a, 55a).

(5) Appellant's Contentions and the Rulings of the State Court

Appellant contended that an average number of its diesel locomotives and freight cars run under the Operating

Agreement on fixed routes and regular schedules over the lines of CNJ in New Jersey had acquired a "permanent situs" outside of Pennsylvania; that an average number of its freight cars not run on fixed routes and regular schedules but run habitually, regularly and continuously under the Car Service and Per Diem Agreement on the lines of other railroads outside of Pennsylvania had acquired a "permanent situs" and were continuously absent from Pennsylvania; and that the *unapportioned* property tax assessed thereon violated Due Process and the Commerce Clause.

The Supreme Court of Pennsylvania sustained appellant's contention and reversed the Trial Court in respect to diesel locomotives. It made no distinction between appellant's freight cars run on fixed routes and regular schedules (R. 215) and those that did not. It sustained the unapportioned tax on *all* freight cars on the ground that even though they were run irregularly but continuously on the lines of other railroads in, in and out, or outside of Pennsylvania, and even though an average number may be present in another state (R. 213, 215, 216), they did not acquire a situs apart from appellant's domicile and, therefore, the unapportioned tax thereon did not violate the Due Process provisions, and the Commerce Clause, of the Federal Constitution. In so holding, the state court relied upon a decision of this Court [2] and its burden of proof rule which are no longer applicable to units of transportation equipment habitually employed in several states.[3]

Appellant contended, also, that denial of tax apportionment to it for its freight cars while on the lines of other railroads outside of Pennsylvania under the car service and Per Diem Agreement and *the apportionment of the same tax* on

[2] *New York Central and Hudson River R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714 (1906).

[3] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

freight cars of other owning railroads under similar circumstances discriminated against appellant. The Supreme Court of Pennsylvania overruled this contention on the ground that Pennsylvania could make valid classification between appellant whose railroad trackage was wholly in Pennsylvania and other owning railroad companies whose trackage extended beyond Pennsylvania's borders (Opinion, R. 216).

INTRODUCTION TO ARGUMENT

The nature of the tax is not in dispute. Although denominated a capital stock tax, it is construed by the Supreme Court of Pennsylvania as a tax on property and assets of the corporation (Opinion, R. 210). The tax statute excludes from its operation property located or having a situs outside of Pennsylvania (Appendix A, post, p. 44), and it has been so construed.[4]

Since the federal rights asserted by appellant under the Due Process provisions, and the Commerce Clause, of the Federal Constitution turn upon the determination of the question of situs and correlation of the taxing power of Pennsylvania and the several states in which its freight cars are used it is within the province of this Court to analyze the facts in order to apply settled legal principles, if any, to the precise circumstances in the instant case, and thus to ascertain whether the conclusion of the state court denying situs apart from appellant's domicile has adequate support in the evidence.[5]

The Supreme Court of Pennsylvania concluded that because appellant's freight cars were not run on regular routes and fixed schedules (clear error as to those under Operating

[4] *Com. v. Delaware, Lackawanna & Western R. R. Co.*, 145 Pa. 96, 22 A. 157 (1891); *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[5] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 159, 54 S. Ct. 152 (1933); *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292, 293, 64 S. Ct. 950 (1944).

Agreement) and, instead were run irregularly *but continuously* on the lines of other railroads in, in and out, and out of Pennsylvania, they did not acquire a situs outside the state and, therefore, non-domiciliary states did not have the power to levy an apportioned property tax thereon. In reaching this conclusion the state court relied upon the decision of this Court in *New York Central and Hudson River Railroad Co. v. Miller*,[6] and held inapplicable those decisions of this Court requiring tax apportionment both where the units of equipment were run on fixed routes and regular schedules and where they were run irregularly *but continuously* into, through and from the taxing state and other states.[7]

The *Miller* case applied the "home port" vessel rule (domiciliary situs), viz., that units of transportation equipment have their situs at the owner's domicile unless specific units were "continuously without the state during the whole tax year". The *Miller* case and its rule were the basis of this Court's decision in *Northwest Airlines Inc. v. Minnesota*,[8] but, as recognized by the Supreme Court of Pennsylvania in the instant case (R. 215), that decision was later modified or overruled.[9]

[6] 202 U. S. 584, 26 S. Ct. 714 (1906).

[7] Regular routes and fixed schedules:

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

Irregular routes but continuous movement:

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 S. Ct. 631 (1900); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 26 S. Ct. 36 (1905); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[8] 322 U. S. 292, 64 S. Ct. 950 (1944).

[9] Cases cited in Note 3.

The other decisions of this Court cited in Note 7 herein involving units of transportation equipment such as pullman cars, refrigerator and tank cars, boats, barges and vessels operated on inland waters, and airplanes, the doctrine was developed that no one of the states in which the equipment was habitually or continuously employed could tax the entire number of units regardless of their use in other states and required the application of the average unit situs rule of apportionment thereby producing constitutional due process relationship between the tax and opportunities, benefits, or protection conferred or afforded by the laws of the taxing state (domiciliary or non-domiciliary).

The crucial issue in the instant case is which of the two rules is applicable. This entails the determination of the extent of property tax immunity in the home state of units of transportation equipment habitually employed in other states.

There is involved, also, the secondary issue whether the unapportioned assessment on appellant's freight cars discriminates against it when the tax on freight cars owned by other railroads is apportioned under the same circumstances.

SUMMARY OF ARGUMENT

I. An average number of appellant's freight cars acquired a situs outside of Pennsylvania or were habitually and continuously employed in Pennsylvania and other states; and, therefore, the unapportioned property tax assessed thereon by Pennsylvania violates the due process provisions, and the Commerce Clause, of the Federal Constitution.

A. Although its railroad lines lie wholly within Pennsylvania, appellant is engaged substantially in interstate commerce as an originating or terminating carrier; and it is a

component part of the intergrated railroad system in the United States.

1. In providing through freight service under an Operating Agreement with Central Railroad Company of New Jersey (CNJ), it furnishes diesel locomotives and freight cars which are run on fixed routes and regular schedules over its own lines in Pennsylvania and over the lines of CNJ; and for such use, it receives a division of freight revenue and, while on the lines of CNJ, a mileage rate for its locomotives and a per diem rental for its freight cars.

2. To facilitate through freight shipments over its own lines and the lines of other railroads, pursuant to the provisions of the Interstate Commerce Act (49 U.S.C.A. § 1, Pars. 4, 10, 11) it is a subscriber to the Car Service and Per Diem Agreement of the Association of American Railroads under which its interchanges with other railroads at a per diem rental its entire fleet of 3074 freight cars which, to destination of freight shipment and in return to appellant's home road, are run regularly, habitually and continuously over the lines of other railroads in, in and out, and outside of, Pennsylvania.

B. The unapportioned tax assessed by Pennsylvania on the full value of all of appellant's diesel locomotives and freight cars was reversed by the State Court as to diesel locomotives and sustained as to freight cars, no distinction being made between cars used under the two separate and different Agreements. Although denominated a capital stock tax, it is a tax on the property and assets of the corporation (R. 210).

C. Special rules have been developed in the property taxation of migratory tangible property consisting of units of transportation equipment used as vehicles of interstate commerce in *several* states or taxing jurisdictions. The particular rule and concomitant legal principles applicable in the

instant case, as well as the error of the State Court, will be indicated.

1. The general tangible property rule is *not* applicable. Under this rule, the tangible property has a situs at the owner's domicile, even though temporarily absent, unless it has obtained a permanent situs elsewhere.[10] The rationale of this rule is that property such as a portable sawmill, a herd of cattle, or a stock of merchandise, is present in and receives protection under the laws of only one state.

2. The "home port" (owner's domicile) rule, initially involving ocean-going vessels and vessels operating on inland waters but later limited only to the former, is *not* applicable. Under this rule, the vessel is taxable at the owner's domicile[11] provided it has not acquired an actual situs elsewhere *by being used exclusively throughout the tax period* in another state or taxing jurisdiction.[12] The rationale of this rule is that the vessel's stay in port is a mere incident of its voyage.[13] The State Court erroneously applied this rule and its proof burden in the instant case.

3. The average unit rule of apportionment is applicable in the instant case. This rule is that "when a fleet of cars (or other types of transportation equipment) is *habitually* employed in *several* states—the individual cars constantly running in and out of each state—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States" and "when individual items of rolling stock are not continuously the same but are constantly changing as the nature of their use re-

[10] *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[11] *Ayer & Lord Tie v. Kentucky*, 202 U. S. 409, 26 S. Ct. 679 (1906).

[12] *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 S. Ct. 686 (1905).

[13] *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 75; 32 S. Ct. 13 (1911).

quires," each such state "may fix the tax (property) by reference to the average number of cars found to be habitually within its limits."

The basis of jurisdiction is the habitual employment of the property within the State and, by nature of that employment the property must bear its fair share of the burdens of taxation to which other property within the state is subject.

The rule is applicable to property taxation by the domiciliary and non-domiciliary state. Any reasonable formula related to time and use (mileage, gross rentals, arrival and departures, tonnage, and period of time) is used, in the case of non-domiciliary states, to determine the average number of units said to have a "permanent situs" within it[14] and, in the case of domiciliary states, to determine the average number of units said to have a "permanent situs" *without the state*[15] or the average number within such state.[16] In either case, the tax must have relation to the "opportunities, benefits or protection conferred or afforded by the laws of the taxing state."

When the property tax of a domiciliary state is at issue, it is not necessary, because of the habitual employment of the units of property in the several states, that taxpayer's proof establish the specific non-domiciliary states in which is located the average number of units having a permanent situs outside of the domiciliary state".[16]

The facts in the instant case require the application of the average unit rule of apportionment.

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[14] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[15] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[16] Cases cited in Note 15 and *Flying Tiger Line Inc. v. County of Los Angeles, (Cal.)* 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

Under the Operating Agreement, appellant's freight cars operated on regular routes and fixed schedules. This is the best evidence of habitual employment. In every such case, this Court has held that the average unit rule applied.[17]

Absence of fixed routes and regular schedules, lack of ownership of trackage and use of property by other than owner do not make the average unit rule inoperative in respect to the owner (tank and refrigerator car cases). The tests here are irregular routes but regular and continuous movement and habitual employment.

The parties have stipulated that appellant's freight cars under the Car Service and Per Diem Agreement were habitually, regularly and continuously employed at a per diem rental on the lines of other railroads, in, in and out, and out of, Pennsylvania. On the basis of this stipulation, a time and use formula, based on car days, determines that an average of 2189.30 of appellant's cars were habitually employed and had a situs outside of Pennsylvania as compared with an average of 440.57 cars in Pennsylvania.

The onus is on the domiciliary state (Pa.) to prove that its tax has been fairly apportioned and not on appellant to establish situs in specified non-domiciliary states. Even if appellant had such burden, it has been met (Brief, post, pp. 33-35, and Appendix B.)

The State Court in sustaining the unapportioned tax on appellant's freight cars committed two basic errors: (1) it relied solely on *New York Central and Hudson River Railroad Co. v. Miller*[18] and (2) it ruled that appellant's cars "which move irregularly and continuously about the country * * * do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them." (R. 215, 216). The *Miller* case involved the movement of rolling stock over

[17] Example—*Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[18] 202 U. S. 584, 26 S. Ct. 714 (1906).

the railroad's own lines and the lines of other railroads outside of New York, the domiciliary state, whose unapportioned tax was sustained by application of the "home port" rule which required proof that specified units were present and employed outside the state throughout the entire tax period. This case was relied upon by Minnesota and this Court in *Northwest Airlines Inc. v. Minnesota*[19] but that case was subsequently modified or overruled in favor of the average unit rule.[20]

In respect to the second error, "the degree of continual and regularly scheduled presence" of appellant's freight cars in other states is precisely the same as in the tank and refrigerator car cases which sustained an apportioned tax by non-domiciliary states.[21]

An average of appellant's freight cars operated under the two Agreements, obtained a situs outside of Pennsylvania and, therefore, the unapportioned tax thereon, violates due process and it, also, violates the Commerce Clause because such average was exposed to multiple state taxation.

II. The unapportioned tax discriminates against appellant and is not cured by alleged valid classification based on the difference between railroads, having trackage only in Pennsylvania, and railroads having trackage outside Pennsylvania.

If, as held by the State Court, freight cars, while on the lines of using railroads outside of Pennsylvania under the two Agreements, did not acquire a tax situs apart from the owner's domicile and the domiciliary state has constitutional power to levy an unapportioned property tax thereon (R.

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[19] 322 U. S. 292, 64 S. Ct. 950 (1944).

[20] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[21] Examples—*American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959).

216), then the exercise of the power against appellant and the failure to exercise it against other owning railroads having trackage outside the state constitutes the very essence of discrimination under the Pennsylvania Tax statute, not only against appellant but against others similarly situated, and is not cured by the red herring of valid classification.

III. The issues presented raise substantial Federal questions and should be adjudicated.

The judgment of the State Court sustaining the unapportioned property tax is based upon a decision of this Court that is not applicable; it is contrary to the many decisions of this Court applying the average unit rule requiring apportionment of other types of transportation equipment such as pullman cars, tank cars, refrigerator cars, boats, barges and vessels operating on inland waters, and airplanes, under similar circumstances; it supports property taxation by a domiciliary state having no relation to opportunities, benefits, or protection conferred or afforded by its laws; it erodes settled legal principles vesting in the several states the power to levy a property tax on their fair share of tangible personalty physically present and habitually employed within their borders; and it confirms unapportioned property tax assessments under the Pennsylvania tax statute, which are believed to be discriminatory.

ARGUMENT

I

An Average Number of Appellant's Freight Cars Used Under the Operating Agreement and Under the Car Service and Per Diem Agreement Acquired a Situs Outside Pennsylvania or Were Used Habitually and Continuously in Pennsylvania and in Other States; And, Therefore, the Unapportioned Property Tax Assessed Thereon by Pennsylvania Violates the Due Process Provisions, and the Commerce Clause, of the Federal Constitution.

A brief discussion of the tangible property taxation rules will establish the rule or rules to be applied to determine situs and property tax liability in the instant case.

It is axiomatic that a taxing authority cannot tax property over which it has no jurisdiction. Such a tax would be unreasonable and would violate due process. The question of jurisdiction is a product of judicial decisions. The constitutional tests of a state's jurisdiction and power to tax under due process are physical presence, habitual use and correlative situs in the taxing state, viz. "whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state".[22]

A. General Tangible Property Rule and Principles.

In the case of real estate[23] and tangible property physically present in only one state or temporarily absent therefrom like a portable sawmill or herd of cattle—only the state in which the property is located has power to levy a property tax thereon. Here there is sole or substantial presence in, and protection afforded by, only one state.

[22] *Standard Oil Co. v. Peck*, 342 U. S. 382, 385, 72 S. Ct. 309 (1952); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432 (1949); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36 (1905).

[23] *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 (1935).

Thus, tangible personalty located in another state cannot be taxed at the owner's domicile.[24] However, if it has no permanent location or correlative situs in another jurisdiction, it is taxable at the *owner's domicile*. This is the basis of the "home port" rule, viz., a ship engaged in interstate or foreign commerce on the high seas or coastal waters is taxable at the owner's domicile[25] provided it has not acquired an actual situs elsewhere by being used exclusively throughout the tax period in another state or taxing jurisdiction.[26] The rationale of this rule is explained in *Southern Pacific Co. v. Kentucky*[27] (p. 75) as follows:

> "It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular state, and quite another to attribute to a seagoing ship an actual situs at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."

Under the circumstances, the time of a vessel in a port or ports is insignificant compared to the time on the high seas or in coastal waters outside of any taxing jurisdiction. This differs from units of transportation equipment on land which are in one or more taxing jurisdictions *at all times*.

The "home port" rule as to vessels operating on the high

[24] *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

[25] *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 S. Ct. 679 (1906).

[26] *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 S. Ct. 686 (1905).

[27] 222 U. S. 63, 75, 32 S. Ct. 13 (1911).

seas between foreign ports was applied recently[28] to the airplanes of foreign countries operating solely in foreign commerce and touching only one port of entry in the United States. The basis of the decision was that, as vessels which sails the seas are subject to admiralty law, airplanes flying international skies are subject to international aviation law, property taxation of the planes by a non-domiciliary country violates the Commerce Clause prohibiting state regulation of commerce in a field admitting only one uniform system, viz., property taxation by the domiciliary country which is not subject to review by the courts of the non-domiciliary country.

B. Average Unit Apportionment Rule and Related Principles

Migratory tangible property consisting of units of transportation equipment used in interstate commerce among the several states comes under a special rule. In 1891, this Court made a distinction between vessels in interstate commerce and railroad rolling stock similarly engaged.[29] In the *Pullman* case, it held that because pullman cars had no fixed situs and travel over land to, from and through the various states, they must be treated differently for the purpose of property taxation from ships which travel on international waterways, have a home port, and touch land only incidentally and temporarily. In this and subsequent cases, the average unit apportionment rule was developed and is concisely stated in *Johnson Oil Refining Co. v. Oklahoma*[30] at p. 162 as follows:

> "The basis of jurisdiction is the habitual employment of the property within the State. By nature of that em-

[28] *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's California Reporter 694, 14 Cal. Reporter 25, 363 P. 2d 25 (1961), cert. den. November 9, 1961 S. Ct. Docket No. 354.

[29] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

[30] 290 U. S. 158, 54 S. Ct. 152 (1933).

> ployment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each State—it can not be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

Under this rule, the constitutional basis of a state's power to tax, either domiciliary or non-domiciliary, is physical presence, habitual employment and "sufficiency of contact" in, or with, the taxing state producing a relation "between the tax and opportunities, benefits, or protection conferred or afforded by the taxing state."

Any formula which is related to time or use of the property within the state,[30] or to the benefits or protection conferred on the property, *is held to determine the average number of property units having a "permanent situs" within the state* unless the taxpayer's evidence establishes without apportionment the average number of such units.[31]

This rule requiring apportionment under due process has been applied to pullman cars,[32] refrigerator cars,[33] tank

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[30] *Union Tank Line Co. v. Wright*, 249 U. S. 275, 39 S. Ct. 276 (1919).

[31] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

[32] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

cars,[34] tow boats, barges and vessels operating on inland waters,[35] and to airplanes.[36]

A resume of these cases indicating whether the taxing state was a domiciliary or non-domiciliary state, the extent of use within the state, whether regular or irregular routes and schedules were involved, and the formula used, is as follows:

In the *Pullman* case, the pullman cars were run on fixed routes and regular schedules over railroad lines to, through and from Pennsylvania, the non-domiciliary state, which used mileage ratio apportionment.

In the *Hall* case, the lessee shippers used the owner's refrigerator cars *irregularly* but continuously on railroads running into, through and from Colorado (non-domiciliary). The owner had no office or place of business or other property in Colorado which used the mileage ratio apportionment tax the cars to the Illinois owner.

In the *Union Refrigerator* case, the lessee shippers took possession of the Kentucky owner's cars in Wisconsin and used them *irregularly* but continuously on railroads to, from, and through Kentucky, the domiciliary state and other states. The ratio of gross earnings was used to determine the average number used in, and taxable by, Kentucky (28, 29, 40 and 67 for 1897, 1898, 1899 and 1900 out of 2000 cars) and the average number having a "permanent situs" outside of Kentucky.

In the *Johnson Oil* case, the tank cars of the Illinois owner were used to make regular shipments (not regular sched-

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[34] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[35] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

[36] *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Flying Tiger Lines Inc. v. County of Los Angeles (Cal.)*, 333 P. 2d 323 (1958) cert. den. 359 U. S. 1001.

II, of that Act (49 USCA § 1) requires such common carriers to interchange facilities and to establish through routes with other such carriers and reasonable rates applicable thereto, the purposes being to facilitate interstate traffic, to eliminate discrimination, and to provide reasonable transportation rates.[7] In the course of its regular business, appellant accepted shipments for continuous transportation to points in other states. Under the Operating agreement between appellant and CNJ (S. F, Par. 14, R. 50a; Exhibit A, R. 58a-65a) appellant's diesel locomotives and freight cars provided through freight service over its own lines in Pennsylvania and over the lines of CNJ in New Jersey. Under these circumstances, appellant was engaged substantially in interstate transportation even though its railroad lines were wholly within Pennsylvania;[8] and, also, its entire fleet of freight cars (3074) was substantially used in interstate commerce by way of interchange under the Car Service and Per Diem Agreement (S. F, Par. 15, R. 50a, 51a; Exhibits Y-2 to Y-5 inc. and Z, R. 131a-143a, R. 145a) on the lines of various other railroads in and out of Pennsylvania.

(2) *Appellant's freight cars run on fixed routes and regular schedules.*

Under the Operating Agreement, heretofore referred to, appellant's diesel locomotives and freight cars were run on fixed routes and regular schedules over its lines in Pennsylvania and over the lines of CNJ in New Jersey in order to provide through freight service.

The decisions of this Court[9] are unanimous in holding

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[7] *U. S. v. Pennsylvania R. Co.*, 323 U. S. 612, 65 S. Ct. 471 (1945).

[8] *Taylor v. Ecc*, 223 F. 2d 251, affirmed 353 U. S. 553, 77 S. Ct. 1037 (1956).

[9] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Nashville, C. & St. Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968 (1940).

ules) from its refinery in Oklahoma (non-domiciliary) to out of state purchasers. Mileage ratio apportionment was the measurement of Oklahoma's taxing power.

In the *Ott* case, the domiciliary situs rule (home port) of ocean going vessels was rejected in its application to vessels on inland waterways which were placed on the same tax apportionment basis as land transportation equipment. In this case, towboats and barges of several companies operating on the Mississippi River, *not on established routes and schedules*, stopped for relatively short periods of time (varying from $2^{2}/_{10}\%$ to $17^{1}/_{2}\%$ of total time) to load and unload in Louisiana (non-domiciliary) ports. The Louisiana tax was based on mileage ratio apportionment.

In the *Peck* case, the property tax of Ohio (domiciliary) levied upon the *full* value of boats and barges of an Ohio corporation not operating on regular routes and schedules on the Ohio and Mississippi Rivers was struck down and apportionment was required. There were no terminals in Ohio and the vessels stopped there occasionally for fuel and repairs. The distance of the waters traveled adjacent to Ohio was small in relation to total distance traveled and the vessels were almost continuously outside of Ohio.

In the *Braniff* case, a fleet of planes with home port in Minnesota was operated on regular routes and schedules in and out of Nebraska (non-domiciliary) which based its tax on apportionment ratio of arrivals and departures, revenue tons and originating revenue, within Nebraska.

In the *Flying Tiger* case, the property tax of California (domiciliary state for tax purposes) on the full value of planes was struck down and *time* apportionment was required. The planes were operated by the military in interstate and foreign commerce, not on regular routes and schedules, in the Pacific Air Lift during the Korean War to and from California, Guam and Japan, and were in California only one third of the time.

C. The Average Unit Apportionment Rule in its Application to Property Taxation by a Domiciliary State Has Been Refined and Extended

In the case of an owner of units of transportation equipment used in interstate commerce in the domiciliary and other states, the unit rule is applied to determine the average number of units having a permanent situs in, and taxable by, the non-domiciliary state. In taxation of such property by the domiciliary state it is assumed with certitude that the factors supporting jurisdiction to tax exist in the several states or two or more of them, viz; physical presence, habitual employment and sufficiency of contact, and that, therefore, property taxation by the domiciliary state must be apportioned to limit its tax to accord with "opportunities, benefits, or protection conferred or afforded" by its laws. Viewing the entire situation, each state is entitled to tax its portion of the interstate commerce to the extent of property used within its borders but the sum total of all apportioned taxes so levied by all states must not exceed one full ad valorem assessment. That is what this Court meant, predicated on due process, when it said in the *Peck* case (p. 385):

> "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all of the property by the state of domicile."

Under this refinement and extension of the average unit apportionment rule, the taxpayer is not required to prove that an average number of units has acquired a situs in specified non-domiciliary states and that such states have exercised the power to tax such units.[1] A concise statement

[1] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 195, 211, 26 S. Ct. 36 (1905); and Note 5 in Mr. Chief Justice Stone's dissenting opinion in *Northwest Airlines Inc. v. Minnesota*, 322 U. S. 292 at pp. 324, 325, 64 S. Ct. 950 (1944); *Standard Oil Co.*

of underlying principles is found in the *Scandinavian* case at pp. 701-2 (6 West's Cal. Reporter 694):

> "The rationale of these cases (Ott, Peck and Braniff) *is not based on the necessity to avoid double taxation* but, rather, on the recognition of the non-domiciliary state's right to fair compensation for the benefits and protection afforded the taxpayer. The power to tax flows from the *presence* of the property in the taxing state and the concomitant privileges enjoyed by its owners while thus employed within the jurisdiction. It is the unfairness of the original 'domicile' or 'permanent presence' doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different apportionment formulae. Thus, the *onus* of double taxation *falls*, not on the jurisdiction levying a fairly apportioned tax, but upon the *domiciliary jurisdiction which refused to apportion its taxes on the basis of benefits and protection actually conferred.*" (Emphasis supplied.)

This statement appears to be in harmony with sound principles of constitutional law.

D. Application of Settled Legal Principles as Discussed To the Facts in the Instant Case

(1) *Appellant and its fleet of freight cars constitute a component part of an integrated, interstate railroad system.*

Appellant was a common carrier subject to the provisions of the Interstate Commerce Act. Section 1, pars 4, 10 and

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v. Peck, 342 U. S. 382 at p. 386, 72 S. Ct. 309 (1952); *Flying Tiger Lines Inc. v. County of Los Angeles*, 333 P. 2d 323 at pp. 326, 331, 332, cert. den. 359 U. S. 1001, *Scandinavian Airlines System Inc. v. County of Los Angeles*, 6 West's Cal. Reporter 694, 701-2 14 Cal. Reporter 25, 363 P. 2d 25, 37 (1961), cert. den. November 9, 1961, S. Ct. Docket No. 354

Absence of regular routes and fixed schedules and instead, irregular but continuous movement and habitual employment of units of transportation equipment in the several states do not give jurisdiction to the domiciliary state to levy an unapportioned property tax thereon [46] nor do they deny to the non-domiciliary state the jurisdiction and power to levy an apportioned property tax thereon as in the case of tank cars,[47] refrigerator cars,[48] trucks[49] and boats and barges operating on inland waters.[50] There is no difference between use and employment of transportation equipment in those cases and use of appellant's freight cars under the Car Service and Per Diem Agreement in the instant case.

The crucial issue is whether a state's jurisdiction and power to tax meet the constitutional tests under due process, viz: physical presence, habitual employment and sufficiency of contact thereby producing the requisite relation between the tax and opportunities, benefits and protection conferred or afforded by the taxing state.

The predominant use and employment of appellant's fleet of 3074 freight cars under the Car Service and Per Diem Agreement were outside of Pennsylvania—71% of the time (ante, p. 8, items 4(b) and 5). On the basis of a time and use formula (car days), 365 car days is the equivalent of an average of *one* freight car. Under this formula, an average of 2189.30 (ante, p. 8, items 4b and 5) of appellant's freight cars was physically present and habitually employed outside of Pennsylvania under said Agreement as

[46] Cases cited in Note 37 herein.

[47] *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152 (1933).

[48] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, (Okla.), 349 P. 2d 746 (1959).

[49] *Area Auto Carriers, Inc. v. Bennett (Arkansas)*, 341 S.W. 2d 15 (1960) Reh. den. Jan. 9, 1961.

[50] *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

compared with an average number of 440.57 cars in Pennsylvania. The car day formula is just as reasonable as the mileage apportionment ratio which has been approved by this Court and which was stated in *Oklahoma Tax Commission v. American Refrigerator Transit Company*[1] to "portray in a fair degree of accuracy the average amount" or number of cars used in the state.

The refinement and extension of the average unit rule of apportionment (discussed ante, pp. 27, 28) is applicable in the instant case where the facts establish physical presence and habitual employment in Pennsylvania and in other states. This rule was not considered by the state court and will no doubt be opposed by appellee. Under this rule, appellant's proof is not required to establish the average number of its freight cars having a situs in specified non-domiciliary states and that those states have exercised the power to tax such units (see cases cited in Note 37 herein). Instead, in these cases, correlative situs is considered and it is held that each state may tax its fair share of the use and employment of appellant's freight cars within its borders; that Pennsylvania's tax must be apportioned to accord with opportunities, benefits, or protection conferred or afforded by its laws; and that the jurisdiction and power of one or more non-domiciliary states to levy an apportioned tax precludes Pennsylvania, the domiciliary state, from levying an unapportioned property tax upon the *full* value of appellant's freight cars.

It cannot be disputed that in addition to physical presence and habitual employment, there is, also, sufficiency of contact on which to base an apportioned tax by one or more non-domiciliary states. Exhibit Y-5 to the Stipulation of Facts (S. F. Par. 15, R. 50a, 51a; Exhibit Y-5, R. 134a-143a) lists the names of railroads wholly outside of Pennsylvania and the number of car days appellant's freight cars were on the lines of each. For example, based on car days, an aver-

[1] 349 P. 2d 746 (1959).

age of 18.83 cars was on the lines of Long Island Railroad (wholly within state of New York); an average of 49.6 cars was on lines of New York, New Haven & Hartford Railroad; and an average of 58.5 cars was on the lines of Illinois Central Railroad. There is no doubt that New York state could tax the average of 18.83 wholly within its borders; and, as in the case of tank and refrigerator cars, each state through which the other two roads run could obtain necessary information from appellant to tax its proportion of average cars of 49.6 and 58.5.

Appellee will contend that appellant's proof is deficient in order to make applicable the average unit rule of apportionment because it does not establish average number of cars in specific non-domiciliary states. The answer is that this rule does not require such proof when a domiciliary state's property tax is at issue. A non-domiciliary state applies the rule to determine the average number of units having a "permanent situs" within its borders, but in the case of a domiciliary state the rule is applied to determine the average number of units having a "permanent situs" outside such state and which during the tax year did not receive "opportunities, benefits, or protection conferred or afforded" by the laws of the domiciliary state.[32] This applies the rule *alike* to domiciliary and non-domiciliary states to determine the proportion taxable by each.

Even if appellant is held to the degree or extent of proof for which appellee will contend, appellant has *in large part* met such burden of proof. The Record discloses the names of using railroads and the number of car days on each—in and out of Pennsylvania and wholly outside of Pennsylvania. (S. F. Par. 15, R. 50a, 51a; Exhibits Y-4 and Y-5, R. 133a-143a). Appendix B hereto lists the average number and value of freight cars on each such railroad where the car days exceed 4000—average cars 1417.32 and average value $5,115,221.64. If the time and use formula of car days

[32] Cases cited in Note 37 herein.

is reasonable, and it is,[3] then average cars of 1417.32 had a situs in the states where these railroads operated and each such state could have obtained the necessary information to tax its proportion of the average number physically present and habitually employed within its borders.

Furthermore, it is stipulated (S. F. Par. 17, R. 51a, 52a) that a detailed examination, study and review of its records by appellant and of reports made to it by using railroads for the month of March 1951 disclosed that 1024 cars were *at all times* on railroads wholly outside Pennsylvania, that 2049 cars were on roads operating in and out of Pennsylvania and that 1 car was on roads wholly in Pennsylvania and that such situation for the month of March represented the average use and employment of its freight cars for the entire year 1951.

Thus, the Record establishes that an average number of freight cars had obtained a situs in the states where the using railroads were operated, and that even under the "home port" or domiciliary situs rule a specific number (1024) was outside Pennsylvania throughout the entire year 1951.

Therefore, appellant submits that Pennsylvania's unapportioned property tax violates due process; and that, because appellant's freight cars are exposed to multiple state taxation, it, also, violates the Commerce Clause.

The State Court ruled (R. 213) that appellant's "freight cars which are indiscriminately interchanged with those of other railroads and which do not run on fixed routes and regular schedules, do not, *although a certain average number may be present in another state*, acquire a tax situs outside the domiciliary state." (Emphasis supplied.) This ruling is clearly contrary to the decisions of this court[4] requiring apportionment of transportation equipment used

[3] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

[4] Cases cited in Note 3 herein.

in several states because in order for an average number "to be present in another state", there had to exist physical presence and habitual employment in such other state.

In reliance solely on the decision of this Court in *New York Central Railroad and Hudson River Co. v. Miller*,[1] the state court ruled further (R. 215, 216) that appellant's freight cars "which move irregularly and continuously about the country, being used interchangeably by other railroads while serving many shippers before returning to the state of domicile, do not attain the degree of continual and regularly scheduled presence which would enable other states, in accordance with due process, to tax them".

As indicated heretofore (ante, p. 13), the *Miller* case applied the domiciliary situs or "home port" rule applicable to ocean going vessels, under which situs of movable tangible property was held to be in the state of the owner's domicile unless actual situs was established by proof of physical presence and use in another state or jurisdiction *throughout the entire tax period*. The *Miller* case was relied upon by the state of Minnesota and by this Court in *Northwest Airlines Inc. v. Minnesota*[2] to support an unapportioned property tax by Minnesota, the domiciliary state, upon a fleet of airplanes used and employed on regular routes and schedules in Minnesota and six other northwestern states. But that decision was subsequently modified or overruled by subsequent decisions of this Court in favor of the average unit rule of apportionment or under this rule as refined and extended.[3]

Although the state court recognized such modification (R. 215), it nevertheless proceeded to apply the rule of the *Miller* case to the instant case. In the *Miller* case, the rail-

[1] 202 U. S. 584, 26 S. Ct. 714 (1906).

[2] 322 U. S. 292, 64 S. Ct. 950 (1944).

[3] *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954); *Flying Tiger Lines Inc. v. County of Los Angeles*, (Calif.), 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.

road challenged the unapportioned property tax assessed by New York, the domiciliary state, upon its rolling stock used on its own lines in and out of New York and on the lines of other railroads outside of New York. The taxpayer presented evidence establishing *its own* road mileage in and out of New York and the car mileage in and out of New York over its own lines and the lines of other railroads to show "that a certain proportion of its cars, although not the same cars, was continuously without the state during the whole tax year." This Court upheld the unapportioned tax on the ground that there was no showing that "some specific portion of the corporate property is outside of the state *during the whole tax year*".

Other decisions of this Court conclusively establish that the rule of the *Miller* case is no longer followed and that under the facts in that case the average unit rule of apportionment or the refinement and extension thereof is held to establish the average number of units having a "permanent situs" in a non-domiciliary state [7] or the average number of units which are beyond the jurisdiction and taxing power of the domiciliary state [8].

Therefore, appellant submits that the state court erred in relying upon and applying the *Miller* case in sustaining the Pennsylvania's unapportioned tax in the instant case.

Some additional arguments which appellee will no doubt advance to support the state court's judgment sustaining the unapportioned tax, although not relied upon by the state court itself, and appellant's answers thereto, are as follows:

1. Appellee will argue that Pennsylvania, as the domiciliary state, has a special standing to levy an unappor-

[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949); *Braniff Airways Inc. v. Nebraska State Board*, 347 U. S. 590, 74 S. Ct. 757 (1954).

[8] *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905); *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952).

tioned property tax on appellant's freight cars. Such argument is without foundation.

The constitutional tests of a state's power and jurisdiction to levy a property tax under due process must be based upon actual physical presence and habitual employment and use of the property in, and sufficiency of contact of the property with, the taxing state—all of which is the equivalent of situs. Since, in the instant case, non-domiciliary states have jurisdiction and power to levy an apportioned property tax on appellant's freight cars, Pennsylvania, the domiciliary state, is precluded from levying an unapportioned property tax thereon. Moreover, such an unapportioned tax has no relation to the opportunities, benefits, or protection conferred or afforded by Pennsylvania's laws and, therefore, appellant's property is exposed to multiple state taxation in violation of the Commerce Clause. Both of these principles negative any special standing of Pennsylvania, as the domiciliary state, to levy an unapportioned property tax on appellant's freight cars.

2. Appellee will argue that since appellant is not qualified to do business in other states and no property or other taxes are paid by appellant on its freight cars to other states (S. F. Par. 12, R. 49a), the unapportioned property tax assessed by Pennsylvania thereon does not violate due process.

Mr. Chief Justice *Stone* in his dissenting opinion in *Northwest Airlines Inc. v. Minnesota*[*] (p. 326) has completely demolished this argument. The extent to which Pennsylvania may constitutionally tax does not depend upon what other states may happen to do, but upon what Pennsylvania has constitutional power to do; and, as we have shown, Pennsylvania does not have constitutional power to assess an unapportioned property tax on appellant's freight cars. Furthermore, the levying of a valid property tax by a state upon properly physically present

[*] 322 U. S. 292, 64 S. Ct. 950 (1944).

and habitually used therein is not conditioned upon qualification to do business and the doing of business by the property owner in the taxing state.[61]

II

Appellant Is Discriminated Against When Tax Apportionment Is Denied to it But Is Allowed to Other Railroads for Freight Cars While on the Lines of Using Railroads Outside of Pennsylvania Under the Car Service and Per Diem Agreement.

The parties have stipulated (S. F. Par. 25, R. 54a, 55a) that tax apportionment for freight cars while on the lines of using railroads outside of Pennsylvania under the Car Service and Per Diem Agreement, denied to appellant, has been allowed to other railroads.

The state court denied appellant's contention of discrimination on the ground that valid classification could be made between appellant having no trackage outside the state, and other railroads having trackage outside the state, who were allowed apportionment (R. 216).

Appellant failed to include in its claim of discrimination its freight cars run on fixed routes and regular schedules. Clearly, as to them, there is discrimination.[62]

If, as held by the state court, freight cars while on the lines of using railroads outside of Pennsylvania under the Car Service and Per Diem Agreement, did not acquire a tax situs apart from the owner's domicile and the domiciliary state had constitutional power to levy an unapportioned property tax thereon (R. 216), then the exercise of this power against appellant and the failure to exercise it against other owning railroads having trackage outside the

[61] *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959).

[62] Cf.: *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876 (1891).

state constitutes the very essence of discrimination which is not cured by the red herring of valid classification.

In *New York Central and Hudson River Railroad Co.*,[54] relied upon by the state court in holding that appellant's freight cars had not obtained a situs outside of Pennsylvania, the fact that the taxpayer railroad had trackage outside the domiciliary state of New York was not considered sufficient to require apportionment.

Appellant submits that the burdens and liabilities are not imposed against other railroads in the same situation as appellant and that, therefore, the unapportioned tax on appellant's freight cars violates the equal protection of the laws provisions of the Federal Constitution.[55]

III

The Questions Presented Should Be Adjudicated by the Court.

In its Order of November 13, 1961, this Court postponed jurisdictional question to hearing on the merits.

The judgment of the State Court sustaining the unapportioned property tax on appellant's freight cars run on fixed routes and regular schedules is contrary to every decision of this Court requiring apportionment under the same circumstances.

The judgment of the State Court sustaining the unapportioned property tax on appellant's fleet of freight cars physically present and habitually used in the domiciliary state and various other states is based upon a decision of this Court[56] which does not reflect the current constitutional tests of a state's power and jurisdiction to assess property taxes and is contrary to the decisions of this Court

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[54] 202 U. S. 584, 26 S. Ct. 714 (1906).

[55] *Atchison, Topeka and Santa Fe Railroad Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609 (1899).

[56] *New York Central and Hudson River Railroad Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714 (1906).

requiring apportionment under similar circumstances of other types of transportation equipment such as pullman cars, tank cars, refrigerator cars, boats, barges, and vessels operating in inland waters and airplanes[56]. This judgment of the State Court brings to issue the extent of immunity of such types of transportation equipment from property taxation by the domiciliary state and the settled legal principles vesting in the several states the power to levy a property tax on their fair share of tangible personalty physically present and habitually employed within their borders.

Furthermore, there appears to be a conflict in state court decisions. In *Flying Tiger Lines Inc. v. County of Los Angeles* (Cal.)[57], the domiciliary state was limited to an apportioned property tax. In *Commonwealth of Kentucky v. Union Pacific Railroad Co.*[58], the non-domiciliary state, in a situation similar to the instant case, was denied the right to levy an apportioned property tax but in *Oklahoma Tax Commission v. American Refrigerator Transit Co.*[59] and in *Arco Auto Carriers, Inc. v. Bennet (Arkansas)*[60], the right of the non-domiciliary state to levy an apportioned property tax was upheld. The Kentucky case was the subject of strong criticism in 49 A.L.R. 1103. This case tends to support, but the California, Oklahoma and Arkansas cases are diametrically opposed to, the state court's judgment in the instant case.

The object and intent of the Pennsylvania Tax Statute (Appendix A) is to levy a property tax on all property of domestic corporations except that "permanently" located outside the state. The constitutional power to tax or not to tax may not be based upon an alleged classification which is not reasonably related to the purpose of the Tax Statute. Discrimination resulting against appellant and other tax-

[56] Cases cited in Notes 3 and 7 herein.
[57] 333 P. 2d 323 (1958), cert. den. 359 U. S. 1001.
[58] 214 Ky. 339, 283 S.W. 119 (1926).
[59] 349 P. 2d 746 (1959).
[60] 341 S.W. 2d 15 (1960); reh. den. Jan. 9, 1961.

payers similarly situated under the Pennsylvania Statute as construed should be eliminated and discrimination against taxpayers under similar construction of tax statutes generally should be discouraged.

These considerations demonstrate that the validity of the Pennsylvania Statute and other statutes similarly construed is not academic or episodic; that the issues involved are of general constitutional dimensions; and that the questions presented are so substantial as to require plenary consideration on the merits.

IV

CONCLUSION

On the basis of legal principles and their application to the facts in the instant case as discussed, appellant respectfully submits:

1. That the issues presented raise substantial federal questions which should be adjudicated by this Court.

2. That the judgment of the state court sustaining the unapportioned property tax on appellant's freight cars run under the Operating Agreement on regular routes and fixed schedules over lines in and out of Pennsylvania should be reversed on the grounds that it violates the due process of the laws provisions, and the Commerce Clause, of the Federal Constitution.

3. That the judgment of the State Court sustaining the unapportioned property tax on appellant's freight cars run under the Car Service and Per Diem Agreement regularly, habitually and continuously on the lines of other railroads operating in, in and out, or outside of Pennsylvania should be reversed on the ground that it violates the due process of the laws provisions, and the Commerce Clause, of the Federal Constitution; but, in the event that additional evidence is necessary to determine whether an average num-

ber of freight cars has acquired a situs in specific non-domiciliary states, the case should be remanded to the State Court for such purpose.

4. That the judgment of the State Court sustaining the unapportioned property tax assessment on appellant's freight cars should be reversed in its entirety on the ground that said assessment discriminates against appellant.

Roy J. Keefer,
Hull, Leiby and Metzger,
Attorneys for Appellant.

APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, * * *, it shall be the duty of every corporation having capital stock, * * *, now or hereafter organized or incorporated by our under any laws of this Commonwealth, and of every corporation, * * *, now or hereafter incorporated or organized by or under any law of any other State, * * *, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

* * * * * * *

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and the value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal * * * of the capital stock of said corporation * * at its actual value in cash as it existed at the close of the year for which the report is made.

Section 21(a) of the Act of June 1, 1889, P. L. 420, as Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21(a). That every domestic corporation * * * from which a report is required under the twentieth section hereof, shall be subject to, * * * a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, * * * as ascertained in the manner prescribed in said twentieth section: * * *.

Section 1 of the Act of June 22, 1931, P. L. 685, 72 Purdon's Pennsylvania Statutes § 1896.

Section 1. Whenever any corporation * * * subject to tax upon its capital stock imposed by and under the laws of this Commonwealth, owns assets which are exempted or relieved from the capital stock tax under the laws of this Commonwealth, the proportion of the capital stock exempted or relieved from the capital stock tax, by reason of the ownership of such assets, shall be the proportion which the value of such assets bears to the value of the total assets owned by such corporation * * *.

APPENDIX B

Average Cars and Average Value Thereof on Railroad Lines In and Outside, or Outside, Pennsylvania Where Car Days Exceed 4000 on Each Line.

	Cars Days	*Average Value*	*Average Cars*
Reading Company	49,733	$4,553,256.62	136.25
Baltimore & Ohio	10,554	96,187.05	28.92
Erie R. R. Co.	5,389	49,114.27	14.76
D. L. & W.	4,023	36,665.82	11.02
Pennsylvania R. R.	45,243	412,335.65	123.95
New York Central	6,764	61,645.74	18.53
Lehigh & New England	4,402	40,118.95	12.06
Lehigh Valley	6,166	56,195.69	16.89
Western Maryland	4,846	43,311.42	13.02
Atchison, Topeka & Santa Fe	20,300	185,064.82	55.61
Atlantic Coast Line R. R. Co.	15,334	139,751.01	42.01
Boston & Maine R. R. Co.	9,105	82,981.15	24.94
Canadian National Railways	19,507	177,782.90	53.44
Canadian Pacific Railway	11,048	100,157.54	31.91
Central of Georgia Railway	4,478	40,811.60	12.27
Chesapeake & Ohio Rwy. C. & O. Dist.	8,866	80,802.95	24.29
Chesapeake & Ohio Rwy. Pere Marq. Dist.	5,765	52,541.05	15.79
Chicago & Northwestern Rwy.	19,068	173,750.22	52.24
Chicago, Burlington & Quincy R. R.	14,248	129,853.42	39.03
Chicago, Milwaukee, St. P. & Pac. R. R.	21,672	197,514.27	59.38
Chicago, Rock Island & Pacific R. R.	14,189	129,315.71	38.87
Elgin, Joliet & Eastern R. R.	10,579	96,414.89	28.98
Grand Trunk Railway System (W. L.)	6,369	58,045.79	17.45
Great Northern Railway	9,653	87,975.51	26.47
Gulf, Mobile & Ohio R. R.	7,562	68,918.56	20.71
Illinois Central Railroad	21,412	195,144.69	58.66
Indiana Harbor Belt Railroad	7,797	71,060.30	21.36
Louisville & Nashville R. R.	12,574	114,596.92	34.45
Long Island Railroad	6,872	62,630.03	18.83
Minneapolis, St. P. & Ste. Marie Rwy.	4,923	44,867.24	13.49
Missouri-Kansas-Texas R. R.	4,695	42,789.29	12.86
Missouri Pacific R. R. (Trustee)	13,343	121,605.43	36.55
New York, Chicago & St. Louis R. R.	17,088	155,736.61	46.82
New York, New Haven & Hartford R. R.	18,124	165,178.51	49.65
Norfolk & Western Railway	6,094	55,551.50	16.70
Northern Pacific Railway	8,438	76,902.24	23.12
St. Louis-San Francisco Railway (Trustee)	8,159	74,359.49	22.35
Seaboard Air Line R. R.	12,886	117,440.43	35.30
Southern Railway System	26,762	243,963.52	73.32
Southern Pacific Co. Pacific System	17,715	161,456.97	48.54
Terminal R. R. Ass'n of St. Louis	4,414	41,228.31	12.09
Texas and New Orleans R. R.	8,997	81,996.86	24.62
Texas & Pacific Railway	4,539	41,367.54	12.43
Union Pacific System	16,033	146,121.56	43.92
Wabash Railroad	4,311	39,289.59	11.81
TOTAL	521,245	$5,125,221.66	1417.32

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IN THE

Supreme Court of the United States

No. 400
October Term, 1961

CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA,
Appellant

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF APPELLEE

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IN THE

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No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLEE

JURISDICTION

The Commonwealth of Pennsylvania, appellee, filed its Motion to Dismiss the present appeal on the ground that the appeal does not present any substantial Federal questions.

By order of this Court dated November 13, 1961, further consideration of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 242).

STATUTES INVOLVED

This appeal involves the application of the Pennsylvania capital stock tax, the relevant portions of which are printed in the brief for the appellant, pages 2, 44, 45.

This Court will generally interpret state statutes in accordance with the construction placed on them by the highest court of the state.[1]

The Supreme Court of Pennsylvania has construed the capital stock tax as follows:

(a) *Nature of Tax*—it is a tax upon the actual value of the capital stock of a domestic corporation as represented by its property and assets;[2]

(b) *Property Exempt or Taxable*—so much of the capital stock of the corporation as is represented by real estate or personal property of a corporeal nature located in another state and *used in the operations of the corporation outside Pennsylvania* is exempt; but such personal property will be taxable in Pennsyl-

---

[1] See *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891), where this Court said: "* * * whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive."; see also *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170, 67 S. Ct. 1584, 91 L. Ed. 1977, 1979 (1947).

[2] *Commonwealth v. Union Shipbuilding Co.*, 271 Pa. 403, 405, 114 A. 257 (1921); *Murray v. Philadelphia*, 364 Pa. 157, 166, 71 A. 2d 280, 284 (1950); and the instant case, R. 210.

vania as the domiciliary state *if it is not permanently located outside the state*.[3]

(c) *Effect on Property of Foreign Corporation*—the mere leasing of property in Pennsylvania by a foreign corporation does not constitute doing business so as to subject the corporation to the capital stock tax.[4]

The Pennsylvania Statutory Construction Act of May 28, 1937, P.L. 1019, provides in Section 58 in part as follows (46 P.S. §558):

> "All provisions of a law of the classes hereafter enumerated shall be strictly construed:
>
> . . . . . .
>
> "(5) Provisions exempting persons and property from taxation;"

[3] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[4] *Commonwealth v. American Bell Telephone Co.*, 129 Pa. 271, 18 A. 122 (1889); in 1935 the Pennsylvania Capital Stock Tax Act was amended so that thereafter foreign corporations became subject to the franchise tax in lieu of the capital stock tax.

QUESTIONS PRESENTED

1. In imposing capital stock tax upon the property of a domestic railroad corporation having no tracks outside Pennsylvania, must the Commonwealth exempt the railroad's freight cars temporarily outside Pennsylvania which, being on lines of other railroads, had not acquired an actual situs in any other state?

2. Has the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated states, sustained its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax?

3. Did the refusal of the taxing departments to grant appellant a property allocation for rolling stock on tracks of other railroads outside Pennsylvania violate equal protection because other railroads having tracks both inside and outside of Pennsylvania had received an allocation for rolling stock, based on track miles in Pennsylvania over track miles everywhere?

STATEMENT OF THE CASE

The appellant is a domestic railroad corporation, incorporated under the laws of Pennsylvania, and domiciled in Pennsylvania. It has no railroad tracks outside Pennsylvania, and thus does none of its railroad business, i.e., transportation by rail for hire, outside Pennsylvania.

The appellant has as its sole shareholder the Central Railroad Company of New Jersey, a New Jersey Corporation (R. 38a), referred to hereinafter as CNJ. During 1951 the appellant operated its railroad from the anthracite coal region in Pennsylvania to the New Jersey border at Easton, where it connected with the railroad lines operated by CNJ (R. 38a). Prior to 1946, appellant's lines had been operated under a lease agreement by CNJ with the equipment of CNJ, but in 1946, the appellant took over the operation of its lines in Pennsylvania and leased certain property and equipment from CNJ. The appellant also entered into an operating agreement with CNJ (R. 38a, 39a).

The appellant was not authorized to do business in any other state outside Pennsylvania, and did not pay corporation taxes to any other state (R. 38a).

The general officers and subordinate officials of the appellant were generally the same as those of CNJ and were on the payroll of CNJ (R. 41a, 45a). CNJ was then reimbursed by appellant for wages and salaries expended by it on behalf of work done for

attained a tax situs outside Pennsylvania", they were subject to a capital stock tax at full value (R. 215, 216).

However, the Court distinguished the appellant's railroad freight cars (including those on the line of CNJ) from the Diesel locomotives, and held that the latter should not be taxed at full value by Pennsylvania, because they had obtained a tax situs in New Jersey from continuous travel on fixed routes and schedules to and from New Jersey (R. 215). While no appeal has been taken by the Commonwealth from the adverse ruling as to Diesel locomotives, the Commonwealth, as appellee, reserves the right to maintain its initial position to the extent necessary to sustain the decision here appealed from.

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania holding that the appellant's freight cars which were temporarily outside Pennsylvania on lines of other railroads, had not acquired a tax situs outside Pennsylvania, and were therefore not exempt from the Pennsylvania Capital Stock Tax imposed on domestic corporations.

The capital stock tax has been construed so that tangible personal property will be taxable in Pennsylvania as the domiciliary State if it is not permanently located outside the State.[5]

The Commonwealth's first contention is that Pennsylvania, the State of incorporation, may tax all of appellant's rolling stock which has not acquired an actual situs in some other specific state.

The right of the domiciliary state to include in the measure of the tax such meandering freight cars was upheld by this Court in *New York Central R.R. (etc.) v. Miller*.[6] The ruling of that case has never been modified or overruled. Therefore, the present appeal does not present a substantial Federal question of due process or interstate commerce.

---

[5] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[6] 202 U.S. 584, 26 S. Ct. 714, 50 L. Ed. 1155 (1906).

Subsequent decisions relied upon by the appellant involving airlines and barge companies do not apply to the instant situation, because in all of these cases the taxpayer was itself operating its own equipment on its own routes outside the taxing jurisdiction and was therefore subject to taxation in such outside states. In the present case, the appellant had no tracks outside Pennsylvania, operated no trains outside Pennsylvania and paid no taxes on its property or franchises to any other state.

Appellant is contending that Pennsylvania must apportion the tax value of its freight cars, because their presence on the trains and tracks of other borrowing railroads throughout the United States subjects the appellant's freight cars to taxation by all 48 of the states through which pass all of the tracks of all of the borrowing railroads. Thus, if this Court should abandon its rule in the *New York Central Railroad* case and that of the courts below, every railroad in the United States can be subjected to tax by all of the states of the Union. This contention overlooks the elementary distinction between the tax liability of (a) a railroad doing its own business in a foreign state with its own tracks and equipment, and (b) a railroad which has no tracks or railroad business within the foreign state, but only freight cars borrowed under a mutual agreement solely for use in transit in the borrower's business.

The Commonwealth's further contention is that the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated

states, did not sustain its burden of proving that any such cars had acquired an actual situs in any other specific state during 1951, so as to require Pennsylvania to exempt them from capital stock tax.

Finally, in granting a track mileage exempt ratio for the freight cars of railroads having tracks both inside and outside of Pennsylvania, the Commonwealth did not discriminate against appellant, which had no tracks outside Pennsylvania. Thus, this classification, held reasonable by the courts below, does not present a substantial Federal question of equal protection.

ARGUMENT

I. Pennsylvania, the State of Incorporation, May Tax All of Appellant's Rolling Stock Except That Having an Actual Situs Outside Pennsylvania

(a) *Taxing Powers of Domiciliary States*

It is a well-established principle of law that the legislative power of every state applies to all property within its borders. For centuries personal property has been regarded as subject to the law of the owner's domicile, as expressed in the maxim *mobilia sequuntur personam*. This doctrine grew up in the Middle Ages when moveable property consisted chiefly of gold and jewels, and thus originally applied to tangible property wherever located. The situs of any such tangible personal property (mobilia) was at the domicile of the owner.[7]

While the rule has been limited so that it no longer applies to tangibles which have their tax situs away from the owner's domicile, the maxim still applies to property temporarily outside the taxing jurisdiction of the domiciliary state, if the property has not acquired an actual or permanent situs elsewhere.

In the Annotation in 119 A.L.R. 707, 713, the rule is stated as follows:

[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 22, 11 S. Ct. 876, 35 L. Ed. 613 (1891).

"The operation of the maxim 'mobilia sequuntur personam' is nullified with respect to taxation of tangible personal property only to the extent such property has acquired a *factual permanent situs elsewhere*. It follows that the power of the domicil under that maxim is not abrogated in respect to property which may be *temporarily absent* from its territorial jurisdiction. In short, *not until the property acquires an actual situs elsewhere does the domicil lose the right to tax*. * * *"

(Emphasis supplied.)

To the same effect, see Annotation in L.R.A. 1915C, page 908. See also 84 C.J.S., Taxation, §115, page 226, which states:

"* * * Thus in the absence of any evidence that tangible personal property has an *actual or permanent situs elsewhere* than in the state of the owner's domicile, it is taxable to the owner in such state, although it has never been brought within the boundaries of the state."

(Emphasis supplied.)

The Supreme Court of Pennsylvania has construed the Pennsylvania Capital Stock Tax in accordance with the principle that tangible personal property having no permanent situs outside Pennsylvania is subject to capital stock tax when Pennsylvania is the State of domicile.

In *Commonwealth v. American Dredging Co.*[*] the Court denied an exemption for so much of the ap-

[*] 122 Pa. 386, 391, 15 A. 443 (1888).

pellant's capital stock as was represented by four dredges, a tug boat and eleven scows which had been built outside of Pennsylvania and had never been within it, saying:

> "It must be conceded that *the property in question must be liable to taxation in some jurisdiction.* If it were permanently located in another state, it would be liable to taxation there. But the facts show that *it is not permanently located out of the state.* From the nature of the business, it is one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that *if not taxable here, it escapes altogether.* The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steamship Co., 17 How. 596. These vessels, if they may be so called, were not registered. *Hence, their situs for taxation is the domicil of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state.*"
>
> (Emphasis supplied.)

In *Commonwealth v. Universal Trades, Inc.*,[9] the present Pennsylvania Chief Justice, in sustaining the imposition of the capital stock tax on a domestic

---

[9] 392 Pa. 323, 333, 141 A. 2d 204, 209 (1958), cert. den. 358 U.S. 129, 938.

corporation which transacted its business and held its intangibles in Florida, quoted with approval from the decision of this Court in *Cream of Wheat Co. v. Grand Forks Co. of N. D.*,[10] as follows:

> "* * * The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property *which has acquired a permanent situs beyond its boundaries.*" * * * The limitation upon the power of taxation does not apply even to tangible personal property without the state of corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere. Southern Pacific Co. v. Com. of Kentucky, 222 U.S. 63, 68, 32 S. Ct. 13, 56 L. Ed. 96 * * *"

(Emphasis supplied.)

The decision of this Court in *Cream of Wheat Co. v. Grand Forks Co. N. D.*, quoted above, was reaffirmed in *Newark Fire Insurance Co. v. State Board of Tax Appeals*,[11] where, in a concurring opinion joined by Justices Black and Douglass, Justice Frankfurter stated:

> "* * * the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval. * * *"

In *Southern Pacific Company v. Kentucky*,[12] in upholding a state property tax on a fleet of steamships

[10] 253 U.S. 325, 328, 329, 40 S. Ct. 558, 559, 64 L. Ed. 931 (1920).

[11] 307 U.S. 313, 324, 59 S. Ct. 918, 83 L. Ed. 1312 (1939).

[12] 222 U.S. 63, 68, 32 S. Ct. 13, 56 L. Ed. 96 (1911).

owned by a domestic corporation but permanently employed on the high seas, this Court said:

> "* * * The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the *protection which the owner receives from the government of his residence.* * * *"
>
> (Emphasis supplied.)

Likewise, in *Greenough v. Tax Assessors*,[13] this Court, summarizing this rule, said:

> "* * * And, where the taxable property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles *because the corporation exists under the law of its domicile.*"
>
> (Emphasis supplied.)

See also *Northwest Airlines, Inc. v. Minnesota*,[14] where this Court said:

> "The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. * * *"

The foregoing decisions plainly confirm the power of the domiciliary state to tax the tangible personal property of a domestic corporation, unless such property has acquired a taxable situs outside the taxing state. This principle has been applied by this Court to rolling stock and other moveables, as shown by the decisions analyzed on the following pages.

---

[13] 331 U.S. 486, 491, 67 S. Ct. 1400, 91 L. Ed. 1621 (1946).
[14] 322 U.S. 292, 297, 64 S. Ct. 950, 88 L. Ed. 1283 (1944).

(b) *Cases Construing State Taxes on Domestic Corporations Uphold the Power to Tax Migratory Rolling Stock*

The decisions of this Court have uniformly upheld the power of a domiciliary state to impose taxes on or measured by tangible personal property, irrespective of its physical location, unless it has acquired a taxable situs beyond the borders of the taxing state.

Perhaps the first significant case construing the taxing power of a state over a domestic corporation was *Union Refrigerator Transit Co. v. Kentucky*.[15] There Kentucky, the domiciliary state, attempted to levy personal property taxes on the rolling stock (refrigerator cars) of the Union Transit Company. The question, as stated by this Court, was whether a domestic corporation was "subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business". During the years involved, the cars were employed by the company but returned by them to the shipper who took possession of them in Wisconsin. This Court referred to this property as "*wholly and exclusively within the jurisdiction of another state*", and held that Kentucky could not tax it.

In *New York Central RR. v. Miller*,[16] this Court clarified the rule in the *Union Transit Company* case as to property which had not acquired a permanent situs outside of the state. The railroad involved was a domestic corporation owning or hiring lines without as well as within the state, having arrangements with

[15] 199 U.S. 194, 201, 26 S. Ct. 36, 50 L. Ed. 150 (1905).
[16] 202 U.S. 584, supra, note 6.

other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own. The court described the business of the railroad as follows (202 U.S. 593-594):

> "* * * The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business *a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State.* This contention the comptroller disallowed."
>
> (Emphasis supplied.)

The proceedings had been remitted to the comptroller for evidence as to whether any of Central's "rolling stock was used exclusively outside of the State". At the rehearing before the comptroller, "no evidence was offered to prove that any of the relator's cars or engines were used *continuously and exclusively outside of the State during the whole tax year*". Evidence showed movements of particular cars, and Central mileage and car mileage inside and outside of the State, in order to show that "a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year".

Parenthetically, it should be noted in the instant case that the appellant has offered no evidence as to freight cars continuously outside of Pennsylvania, but relies upon the ratio of "car days" in Pennsylvania over "car days" everywhere as the basis for its allocation of freight cars; see Stipulation of Facts, Exhibit "Y" (R. 130a-144a).

In deciding the *New York Central case*, this Court construed the New York Franchise Tax the same as the Pennsylvania Capital Stock Tax. The holding of the Court is summed up in the following language (202 U.S. 596-598):

> "* * * It is true that it has been decided that property, even of a domestic corporation, cannot be taxed *if it is permanently out of the* State. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 201, 211; Delaware Lackawanna & Western R. R. v. Pennsylvania, 198 U.S. 341; Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, *even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back.* Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. * * *
>
> "* * * In the present case, however, it does not appear that any specific cars or any average

of cars was so continuously in any other State as to be taxable there. *The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads.* Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."

(Emphasis supplied.)

Thus, the *New York Central* case, based upon facts similar to the facts in the present case, is ample authority for holding in the instant case that the appellant's rolling stock operated by other railroads outside of Pennsylvania had not acquired a tax situs outside of Pennsylvania, and are therefore taxable by Pennsylvania as part of appellant's property having a situs here.

The doctrine of the *New York Central* case was extended to the taxation of aircraft in *Northwest Airlines, Inc. v. Minnesota*.[17] This Court there sustained a personal property tax on the entire fleet of Northwest Airlines, inasmuch as Minnesota was the legal domicile, as well as the home state of the fleet. The Court held that the taxing power of the domiciliary state had a very different basis from that applied in *Pullman's Palace Car Co. v. Pennsylvania*,[18] wherein the property of a nondomiciliary carrier was apportioned to the taxing state on the number of miles

[17] 322 U.S. 292, supra, note 14.
[18] 141 U.S. 18, supra, note 7.

traveled within the state. The Court said (322 U.S. 298):

> "* * * But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is *permanently situated* in a State other than the domiciliary State. *And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.*"

(Emphasis supplied.)

The appellant now contends that the broad scope of the *New York Central* case and the *Northwest Airlines* case was limited in *Standard Oil Co. v. Peck*,[19] That case involved the imposition of the Ohio ad valorem personal property tax on the barges owned and operated by an Ohio corporation. The maximum number of miles traveled by the barges on Ohio waters was 171½ miles. The Ohio taxing officials sought to tax the entire value of the barges because, inter alia, it was the domiciliary state.

The Majority Opinion of this Court, with 2 dissents, held that Ohio was not permitted to tax the whole value of the barges because they had acquired a situs in other states in which they were being operated by the taxpayer. However, this Court did not modify the rule set forth in the *New York Central* case and the *Northwest Airlines* case, but distinguished those cases as follows (342 U.S. 384):

> "* * * New York Central R. Co. v. Miller, 202 U.S. 584, sustained a tax by the domiciliary state

[19] 342 U.S. 382, 72 S. Ct. 309, 96 L. Ed. 427 (1952).

on all the rolling stock of a railroad. But in that case it did not apear that 'any *specific cars or any average of cars' was so continuously in another state as to be taxable there.* * * * Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, allowed the domiciliary state to tax the entire fleet of airplanes operating interstate; but in that case, as in the Miller case, it was not shown 'that 'a *defined part* of the domiciliary corpus' had acquired a taxable situs elsewhere. * * ***

(Emphasis supplied.)

This Court then pointed out "most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year".

This Court then said in conclusion (342 U.S. 384-385):

> * * * The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Transit Co. v. Kentucky, 199 U.S. 194. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

Assuming for purposes of argument that the *Standard Oil Company* case modified the broad rule in the *Northwest Airlines* case, nevertheless, the modification was on a restricted basis. The foregoing quotation shows that the decision was based upon (a) the rule of permitting taxation by several states on an

apportionment basis, and (b) the avoidance of multiple taxation of interstate operations."

It should be noted that neither of these bases apply in the present case. As to the rule of apportionment, such apportionment is not necessary in the present case, because the appellant is not registered to do business in any state other than Pennsylvania (R. 48a). As far as multiple taxation is concerned, there can be none. The appellant pays no capital stock tax or similar taxes as to its rolling stock in any other state (R. 49a).

(c) *Cases Construing State Taxes on Foreign Corporations Do Not Prohibit Domiciliary State From Taxing Migratory Rolling Stock*

The appellant argues that Pennsylvania, as the domiciliary State, does not have the power to tax the full value of the appellant's freight cars, because these freight cars spend some of their time outside Pennsylvania on lines of other railroads; and that this requires an apportionment of the Pennsylvania tax, because the freight cars outside Pennsylvania are subject to tax in other jurisdictions.

However, this argument has no merit unless the appellant's freight cars have acquired a situs in fact or in law in individual states which might subject them to a property tax *as property of the appellant*.

Preliminarily, it should be remembered that:

1. The appellant pays no capital stock tax or similar taxes as to its rolling stock in any other state (R. 49a, ¶12, R. 166a, ¶10).

2. The appellant has no tracks in any other state, and does no railroad business there (R. 165a, §3). Its cars are temporarily in transit while being used by the operating railroad on the tracks of that railroad and for the business of that railroad (R. 167a, §12).

3. The Pennsylvania capital stock tax would not be applied to the appellant's freight cars in the converse situation, i.e., if appellant were domiciled in another state, had no tracks in Pennsylvania, and did not operate its rolling stock in Pennsylvania.[20]

4. This converse situation was graphically illustrated when CNJ, which operated the same in New Jersey as appellant operated in Pennsylvania, reported to the Pennsylvania taxing authorities that it transacted no business within Pennsylvania (R. 55a, §26, R. 168a, §15). The general officers of CNJ were also the general officers of the appellant (R. 40a, §6, R. 67a, 68a, 166a, §7).

5. Appellant is here seeking an exemption. Exemptions from taxation are strictly construed against the person or corporation claiming such exemption.[21]

In order to defeat the jurisdiction of Pennsylvania to tax all of its rolling stock, the appellant has the burden of proving that the rolling stock in question

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[20] *Commonwealth v. American Bell Telephone Co.*, 129 Pa. 217, 18 A. 122 (1889).

[21] §58 (5) of the Pennsylvania Statutory Construction Act, 46 P.S. §558; *Commonwealth v. Sunbeam Water Co.*, 284 Pa. 180, 188, 130 A. 405 (1925); *Hale v. State Board of Assessment and Review*, 302 U.S. 95, 103, 58 S. Ct. 102, 82 L. Ed. 72 (1937).

has acquired an actual tax situs in some other state outside of Pennsylvania. A careful examination of the cases dealing with the jurisdiction of a state to tax the movable tangible property of a foreign corporation does not sustain the appellant's contention.

We have found only one case directly in point here, and the appellant has cited none. This case is *Commonwealth of Kentucky v. Union Pacific Railroad Co.*[22] There the Commonwealth of Kentucky levied a personal property tax upon freight cars owned by a foreign railroad, but present within the State on local railroads under a per diem lease arrangement like the one used by appellant in the present case. Kentucky also attempted to levy a franchise tax upon these foreign railroads on the theory that, by letting and hiring their freight cars for profit to domestic railroads, the foreign railroads were exercising a privilege not permitted by law to natural persons, and making large profits for which they should pay the State franchise tax. The court held that the property had not been within the State for a sufficiently long period of time to establish a situs for taxation other than that of the domicile of its owner. As to franchise tax liability, the court held that the presence of the freight cars within the State was not employment of the cars in the business of the foreign railroad, saying (283 S.W. 122, 123):

> "* * * A railroad freight car, however, is primarily designed for the use of the owning carrier on its own line. *It is not sent by its owner onto the line of another carrier in the prosecution of*

[22] 214 Ky. 339, 283 S.W. 119 (1926).

its owner's business, which is to carry freight on the line of such owner. It is sent onto the line of the connecting carrier *for the convenience of the shipper, and because the United States government requires railroads to do so in through routing.* The tank line and like companies receive a substantial profit from the use of their cars when in the foreign states, or at least their cars are so employed or used in the effort to make such profit. But the railroads do not send their cars into other states in the effort to make any profit from them while there. *The foreign railroads are not doing business in such states as are the tank line and like companies.* Although the freight cars of the foreign railroads are present in this state from time to time, yet each one is but temporarily so, and the cohesive principle which brings changing units together to form a whole which may be taxed—that is, the use and employment of them together as a whole by the owner in the prosecution of some purpose of his, usually business—is absent. * * *

" * * * * * * *

"From what we have said, it results that these foreign owned railroad cars had no situs for taxation in Kentucky during any of the years set out in the statement. If this be so, it then follows that, as these foreign railroads owned no property and did no business within this state during any of these years, they are not liable for the franchise tax here sought to be imposed. * * *"

(Emphasis supplied.)

Thus, we have here a judicial precedent which would directly rule that the freight cars of the appellant passing through the state of Kentucky under the car hire agreement with other railroads have not acquired a tax situs there. The same would be true in the other 46 states of Continental United States.

Although appellant can find no decision construing the tax situs of rolling stock absent from the domiciliary state under a car hire agreement, the appellant relies upon decisions which permit the non-domiciliary jurisdiction to tax movables of a foreign corporation which are within the state on a regular basis.

The first of these cases is *Pullman's Palace Car Co. v. Pennsylvania*, supra (141 U.S. 18). Here Pennsylvania was permitted to impose capital stock tax on Pullman cars used by the taxpayer in Pennsylvania on the basis of a mileage apportionment. There the test for the taxation of rolling stock was the "permanent presence" of such property within the borders of Pennsylvania, the taxing state. Thus, none of the Pullman cars were in Pennsylvania all of the time; but as this Court stated (141 U.S. 26):

> "* * * [although] particular cars may not remain within the State * * * the company has at all times substantially the same number of cars within the State, and *continuously* and *constantly* uses there a *portion* of its property, * * *"
>
> (Emphasis supplied.)

Thus, that decision recognized that the continuous and regular operation by a nonresident taxpayer of a fleet of migratory property in a non-domiciliary state

(Pennsylvania) established the permanent presence there of a portion of the fleet. This idea was reflected by Justice Holmes in *New York Central R. R. Co. v. Miller*, supra (202 U.S. 584), where he said that the taxability of rolling stock by a nondomiciliary state turned on the "continuous" presence of either "specific cars" or of an "average of cars" in the case of a fleet of such stock. The only reason why the court in the *Pullman's Palace Car Co.* case used the mileage allocation was to furnish a convenient and fair dimension as a measure of that portion of the rolling stock subject to taxation.

The second such case relied upon by the appellant is *Ott v. Mississippi Valley Barge Line Co.*,[23] in which the inland water craft of a shipping corporation were permitted to be taxed on a mileage apportionment basis by the non-domiciliary state.

The third case is *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*,[24] in which Nebraska was permitted to tax flight equipment of an interstate air carrier not incorporated in Nebraska on an apportionment basis of landings.

Neither of these decisions abandon the "permanent presence" test for the taxation of moveable property by non-domiciliary states, nor do they abate the distinction in the *Pullman's Palace Car Company* case between "permanent presence" as the *basis* for a tax on migratory property, and miles traveled or stops made within a state as the convenient *measure* to be used where a portion of a fleet of such property is

[23] 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).
[24] 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954).

permanently present within a state because it is regularly and continuously employed there.

In the *Mississippi Barge Line Company* case, as stated by Mr. Justice Douglas, it was not necessary to determine whether the Pullman type apportionment formula approved in that case as a measure for the taxation of any fleet of inland water craft was applicable to the taxpayer's fleet of craft because the Louisiana statute in question " 'was intended to cover and actually covers here, an average portion of property permanently within the state—and by permanently is meant throughout the taxing year' ". Thus, the question was moot as to either the continued validity or the specific applicability of the Pullman test of a "permanent presence" for acquiring situs in nondomiciliary states.

Explicit support for the permanent presence of migratory property as the basis for taxation by nondomiciliary states appears in *Standard Oil v. Peck*, supra (342 U.S. 382) where again, as noted above, Justice Douglas reiterated the rule in *New York Central Railroad Company v. Miller*, supra (202 U.S. 584). Finally, in a concurring opinion in the *Braniff* case (347 U.S. 590, 603), he explains his position regarding his opinions in the *Mississippi Valley Barge Lines* and *Standard Oil Company* cases:

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the *permanency* of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not

subject to an ad valorem tax. Property in transit may move *so regularly and so continuously* that *part* of it is always in the State. Then the fraction, but no more, may be taxed ad valorem."

(Emphasis supplied.)

Appellant also relies upon the *Flying Tiger Line, Inc. v. The County of Los Angeles*.[25] Although the decision rendered in this case was by a four to three vote, the Court was so divided in its opinion that no view earned the approval of the majority. Thus, only three members of the Court subscribed to the official opinion, on which appellant relies. The other four Justices (one in a separate concurring and three in the dissenting opinion) actually support the same principles for the taxation of migratory property as have been advanced by the Commonwealth. Their only disagreement arises over the application of such principles to the facts of the case. The following comments in the concurring opinion corroborates this conclusion (333 P. 2d 330):

"That personal property has its situs at the owner's domicile, has long been recognized as a fiction employed to prevent migratory property from avoiding taxation completely. * * * This fiction was primarily used in cases involving ocean-going vessels which acquired no actual situs elsewhere. It was thought that if they were not taxable at the domicile they might not be taxable at all. * * *"

The trial court properly distinguished this case (R. 204a), inasmuch as the taxpayer there was operating

[25] 51 Cal. 2d 314, 333 P. 2d 323 (1958).

its own flights outside California. It should be noted that Delaware, not California, was the state of incorporation of this taxpayer.

Accordingly, none of the cases relied upon by appellant have weakened the permanent presence test for the taxation of migratory property by a non-domiciliary state. The rule in *New York Central RR. Co. v. Miller*, supra (202 U.S. 584), is still the law of the United States as to railroad rolling stock, and under that case Pennsylvania has the right to tax the full value of the appellant's rolling stock which is not permanently located in some other state.

Finally, the foregoing decisions relating to the taxation by the apportionment of movables in the non-domiciliary state can all be distinguished from the present case, because in each of those cases—Pullman cars, tank cars, airplanes or barges—the movables were operated by the taxpayer as part of the taxpayer's business in the non-domiciliary state imposing the tax. This distinction was aptly expressed by Judge Richards (R. 186a):

> "* * * It has not been demonstrated, at least to our satisfaction, that any part of the defendant's rolling stock has acquired a tax situs outside of Pennsylvania. The apportionment policy is inapplicable, because the defendant does not operate an interstate railroad. This distinguishes the present case from barge, tankcar and pullman car cases where the corporation engaged in its own business in several States. Our conclusion is that the tax situs of all of the defendant's rolling stock is Pennsylvania".

This same distinction was recognized in *Commonwealth of Kentucky v. Union Pacific RR. Co.*, supra (283 S.W. 119, 122), where the Court pointed out that it was "the business of the tank line, refrigerator, Pullman car, and like companies to send their equipment into the various states of the Union for the purpose of carrying goods" and that their cars were so employed in the foreign states in an effort to make a "substantial profit". On the other hand, a railroad freight car is not sent onto the line of another carrier in the prosecution of its owner's business but "for the convenience of the shipper, and because the United States government requires railroads to do so in through routing"; and this is not done "in the effort to make any profit from them while there" (283 S.W. 122).

In the present case, the freight cars are operated by other railroads on trains and tracks of their own and not by the appellant. Appellant is not engaged in the business of renting freight cars for profit, but in the business of running a railroad in Pennsylvania. Therefore, its rolling stock is subject to Pennsylvania property taxes until it acquires an actual tax situs elsewhere. As will be demonstrated in Subdivision II of this brief, infra, there is nothing in the record to show that a single piece of appellant's rolling stock ever acquired such a situs outside of Pennsylvania.

(d) *Rationale of Court Decisions Supports Jurisdiction of Pennsylvania To Tax Appellant's Rolling Stock*

An analysis of the decisions of this Court shows a pattern of permitting the state of the corporation's

domicile to tax its tangible personal property, unless the taxpayer can show an actual situs elsewhere for such property.

In *Union Transit Company v. Kentucky*,[26] this Court refused to permit the domiciliary state to tax such property as was definitely located "wholly and exclusively within the jurisdiction of another state".

In *New York Central R. R. (etc.) v. Miller*,[27] after citing the *Union Transit Company* case, this Court agreed that such property could not be taxed if it were permanently outside of the State, but permitted the domiciliary state to tax the rolling stock of the railroad corporation, because it did not appear that any specific cars or any average of cars were so continuously in any other state as to be taxable there; and the absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. This decision was relied upon by the court below in the instant case (R. 212, 215).

The court below had previously followed the permanent location test for tax situs, and also the test of non-taxability elsewhere.[28]

In *Northwest Airlines, Inc. v. Minnesota*,[29] this Court explained what it meant by property permanently situated in a state other than the domicile, i.e.,

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[26] 199 U.S. 194 (1905), supra, note 15.

[27] 202 U.S. 584 (1906), supra, note 6.

[28] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[29] 322 U.S. 292 (1944), supra, note 14.

"continuously throughout the year, not a fraction thereof, whether days or weeks".

In *Standard Oil Co. v. Peck*,[30] this Court permitted the taxpayer to show that its vessels were continuously outside of the domiciliary state; but this was done to permit taxation on an apportionment basis, in order to avoid multiple taxation of interstate operations. But in the present case, there can be no multiple taxation, because appellant operated no trains outside of Pennsylvania (R. 185a).

The appellant did not pay corporation taxes in any other state (R. 49a). The other states through which the appellant's cars were passing while being operated and used by other railroads, would have had no power to impose taxes on the appellant measured by such cars. See *Commonwealth of Kentucky v. Union Pacific R. Co.*,[31] where the court held that Kentucky could not impose a tax on a foreign railroad as to its freight cars which were being operated within the state by a local railroad under a per diem lease agreement like the one used in the present case.

The decisions in *Ott v. Mississippi Valley Barge Line Co.*,[32] *Braniff Airways, Inc. v. Nebraska State Board*,[33] and *Flying Tiger Line, Inc. v. The County of Los Angeles*,[34] did not repudiate the test for apportionment, set forth in the *New York Central* case,

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[30] 342 U.S. 382 (1952), supra, note 19.

[31] 214 Ky. 339, 283 S.W. 119, 122, 123 (1926), supra, note 22.

[32] 336 U.S. 169 (1949), supra, note 23.

[33] 347 U.S. 590 (1954), supra, note 24.

[34] 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den., 359 U.S. 1001, supra, note 25.

i.e., that the rolling stock must be so continuously in another state as to be taxable there. Furthermore, these decisions are distinguishable from the present case and the *New York Central* case because each of the taxpayers in those cases was engaged in carrying on its own business through the use of its own equipment within the non-domiciliary taxing state.

Therefore, the appellant's freight cars were correctly allocated to Pennsylvania for capital stock tax purposes, because (a) appellant is a Pennsylvania corporation and domiciled in Pennsylvania (R. 39a); (b) none of its freight cars had acquired a fixed or taxable situs outside Pennsylvania; and (c) all of appellant's freight cars outside of Pennsylvania were being operated by other railroads on the trains and tracks of such other railroads and for the business of such other railroads.

II. Appellant Has Not Shown That Any of Its Rolling Stock Acquired a Situs in Any State Outside Pennsylvania

As pointed out in the previous subdivision of this brief, Pennsylvania, the State of domicile, had the power and jurisdiction to tax the appellant's freight cars unless the appellant could show that the freight cars had acquired a tax situs outside Pennsylvania. The court below concluded (R. 216):

> "* * * Since the freight cars used pursuant to the car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value."

The appellant has failed to prove that any of its rolling stock has acquired a tax situs outside Pennsylvania. This failure has several aspects.

First. There is absolutely no evidence to show any location where any of the freight cars had acquired the alleged situs outside Pennsylvania, whether it be in Kentucky, Ohio or Nebraska. "Situs" is defined as "Location; local position; the place where a * * * thing is": Ballentine Law Dictionary (2nd Ed.) 1207. In what states are the appellant's meandering freight cars "located"? The record provides no answer. Appellant apparently proceeded on the premise that,

in order to deprive Pennsylvania of tax jurisdiction, all it had to show was that the unidentified rolling stock was absent from Pennsylvania during a portion of the year. Assuming that the evidence showed this (negatived infra), it is not sufficient to establish a fixed situs in a geographical location in a particular state outside Pennsylvania.

Second. Appellant has proceeded on the erroneous premise that the mere presence of its freight cars in some other unidentified state, wherever it may be, and for however brief a time, gives that state tax jurisdiction. However, tax situs is not determined by the number of days spent by an undesignated number of cars on a given railroad whose tracks may pass through one or more such states.

Thus, the evidence in this case does not provide any basis for holding that any percentage of appellant's rolling stock is exempt from taxation. This evidence will now be discussed with respect to (a) the appellant's freight cars used by other railroads, and (b) appellant's freight cars used by CNJ.

(a) *Appellant's Freight Cars Used by Other Railroads*

Appellant is a member of the "Association of American Railroads". Under a "Car Service and Per Diem Agreement"[35] entered into by members of the Association, the owning railroad is paid a per diem rate ($1.75) for its freight cars while on the lines

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[35] Exhibit "X" R. 49a, 50a, §13, 130a; Appendix, this brief, pages 54-58.

of other subscribing railroad members and on the lines of non-subscribing railroads. In the latter event, the subscribing member delivering the freight car to non-subscriber is responsible to the owning subscriber for the per diem rate accruing on the car while on such non-subscribing road. Reports are required from the using subscriber to the owning subscriber (R. 49a, 50a, §13).

In construing the Car Service Per Diem Agreement, the trial court found as a fact, at the request of the Commonwealth, that when appellant's freight cars were employed on the lines of other railroads, they were under the sole operation and control of such other railroads, and not subject to control of the appellant (R. 167a). The provisions in this Agreement amply sustain this finding of fact.

The provisions of this Agreement (reprinted in part in the Appendix), clearly indicate that the freight cars of any subscriber such as the appellant, must be routed back toward the owner when they are on a foreign road. There is an underlying obligation of the borrowing railroad to direct the cars back to the owning railroad. Applying this to the present case, all of the railroads on which the cars of the appellant were being used had the obligation to so route them as to send them back to Pennsylvania at the earliest possible moment.

Under the Agreement, home cars (cars on the road to which they belong) "shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable" (Rule 1).

Similarly, foreign cars (cars on the road to which they do not belong) must be forwarded to the home road loaded or empty if they are on a direct connection (Rule 2(A)). If the cars are empty at the junction with the home road, and loading at that point via the home road is not available, they must be delivered to the home road at that junction (Rule 2(B)). But when the holding road has no physical connection with the home road and is obliged to use an intermediate road, the car may be delivered to the intermediate road (Rule 2(B)).

If the car is empty at other than junction points with the home road, the car may be loaded via any route so that the home road will participate in the freight rate, or moved locally in the direction of the home road, etc. (Rule 2(C)).

These and other provisions of the Car Service and Per Diem Agreement show the transitory nature of the use by other railroads of appellant's freight cars. The per diem charge is fixed at $1.75 without regard to the miles operated or type of car being used. The only exception is found in the case of refrigerator and tank cars, where the owning railroads may be paid on a mileage basis; see Exhibit "X", "Code of Per Diem Rules—Freight", Rule 1.

The appellant has attempted to establish a tax situs for its rolling stock on other *states* by showing the number of car hire days on other *railroads* (Exhibit "Y", R. 130a, 144a). Obviously, these statistics can bear no relation to the physical location of the cars, especially where the railroads which are operating the cars have tracks in more than one state.

No attempt has been made to trace the path of any specific car during 1951. Appellant bases its claim for an apportionment ratio on the statistics contained in Exhibit "Y" of the Stipulation of Facts, as summarized on statement "Y-6" (R. 144a). But this shows that the allocation of appellant's freight cars was based entirely on theoretical averages, and not on any information regarding the physical location of such cars.

The basic error in appellant's contention is that car hire for days of use on other railroads is not a valid test for determining the location of the appellant's individual cars. These statistics are meaningless. They can be used to prove many conflicting things. For that reason, no infallible conclusion can be drawn from them. Several examples will suffice to illustrate how these statistics do not aid appellant.

Example 1. Assume that each of appellant's freight cars spent some portion of the year on each of the 345 railroads referred to in Exhibit "Y" (R. 130a).

There are 605,678 car days attributed to 306 railroads not operating in Pennsylvania. This is 53.8% of the total car days and an average of 196.37 days out of the 365 days in the year. This gives an average of .65 days per year per railroad in this category. With the same approach as to 26 railroads operating in and out of Pennsylvania, we find that there is an average of 4.81 car days per year per railroad. For 12 foreign roads operating only in Pennsylvania, the average is .76 car days per year per railroad. When the ratio is applied to the appellant's lines, we find 33.94 car days per year per railroad. Therefore, as-

suming that each car spend as many days out of a year as possible on all of the different railroads, the car would have averaged 33.94 days on the appellant's road, and less than 5 days on any other railroad. The car would thus be operated on the appellant's lines 7 times as long as on the lines of any other railroad.

Example 2. The appellant seeks to have its freight cars, which are hired for use on railroads operating in and out of Pennsylvania, allocated to Pennsylvania on the basis of 35% of the average value thereof. This percentage can be determined either on the basis of revenue from per diem car hire (237,048 : 676,431 Exhibit "AA 1" (R. 146a) or on the basis of car days (135,455 : 386,532 Exhibit "Y 4" (R. 133a). In both computations, it was assumed that the road miles in Pennsylvania over total road miles of such railroads operating in and out of Pennsylvania, was the correct ratio for making such an allocation.

Such a formula can have no accuracy in determining the whereabouts of specific cars. Moreover, appellant's records do not indicate whether the mileage figures used for the other railroads included total track miles, or first track miles, or miles of tracks owned, leased and operated. There is no way to guess whether 365 car hire days represents 365 cars on the other railroads for one day each, or one car on another railroad for a full year.

Example 3. The 301 railroads which operate entirely outside of Pennsylvania (Exhibit "Y 5", R. 134a) have accumulated a total of 605,678 car hire days as to appellant's cars. This represents an average of 1,979 car days per year per railroad. This could be

as low as 6 cars on such railroad for the full year, or as high as 1,979 cars for such railroad for one day of the year.

The total per diem car hire allocated to Pennsylvania in the Stipulation of Facts (par. 19 (d), Statement AA-4, R. 53a) cannot be used as the basis for allocation, because it does not take into account the number of days the appellant's cars were operating on their own road.

Since Exhibit "Y" relates only to car hire days on railroads outside Pennsylvania rather than in states outside Pennsylvania, it can have no bearing on tax situs. Similarly, Exhibit AA (R. 146a-157a) can have no significance, because it is based upon the per diem car hire paid by specific railroads (R. 52a, 53a).

Appellant also relies upon statistics compiled for one month during the tax year (March, 1951), which showed the total number of appellant's freight cars, the number of units during that month on railroads operating wholly outside Pennsylvania, the number of units operated at some time during the month on roads within and without Pennsylvania, and the one unit upon a railroad wholly within Pennsylvania (R. 51a, 52a, 47). Appellant seeks to project these statistics for the entire year 1951, because it is the opinion of the appellant that such a situation prevailed through the year.

These statistics are meaningless. Even if the numerals for each category were the same each month (a highly unlikely coincidence), the units and the railroads thus enumerated would surely not be the same. The proposed projection of these statistics is

pure speculation without any basis of fact. They do not include the units operated on the appellant's railroad, which was operating entirely within Pennsylvania. They do not show that the units outside Pennsylvania were in any particular state or on any particular railroad for any length of time.

The net result of the evidence is that no court could possibly conclude that any of the appellant's rolling stock under the car hire agreement had acquired a tax situs outside Pennsylvania, or where the tax situs might be. This was the conclusion of the court below, of the Supreme Court of Kentucky in *Union Pacific Railroad v. Kentucky*,[36] of this Court in *New York Central R.R. v. Miller*,[37] and should be the conclusion here.

(b) *Appellant's Freight Cars Used by Central Railroad of New Jersey*

The Stipulation of Facts also contains evidence as to the business relations between the appellant and CNJ, its parent, with which it connected at the Pennsylvania-New Jersey border. An analysis of this evidence also indicates that none of the appellant's freight cars or the Diesel locomotives operated by CNJ over its lines in New Jersey ever acquired a tax situs in New Jersey.

Prior to August 5, 1946, the appellant's railroad lines, which were located entirely within Pennsylvania, were operated under lease by CNJ with its own

[36] 283 S. W. 119, supra, note 22.
[37] 202 U. S. 584, supra, note 6.

equipment. On August 5, 1946, appellant and CNJ entered into a Lease Agreement under which by direct ownership, or sublease, appellant took over the operation of the said railroad lines in Pennsylvania and leased said property and equipment from CNJ (R. 38a, 39a, 65a, Nos. 4, 5, 6).

On the same date, appellant and CNJ entered into an operating agreement (Exhibit "A", R. 59a), which provided in part as follows:

> "*Section* 1. In order to continue the existing through freight and passenger service over their respective lines, Central [CNJ] shall operate such through service in New Jersey to and from the State Line Junction, and Pennsylvania [appellant] shall operate such through service in Pennsylvania to and from the State Line Junction. Each party shall furnish its fair share of the locomotives and other equipment necessary to operate such service, and where efficient and economical operation so requires, shall temporarily lease locomotives and other equipment to the other party to enable the latter to perform its obligations under this Agreement. *To this end whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and be operated by such other party until returned to the former's line*, and the latter shall pay the former rent for each such locomotive or unit of other equipment as hereinafter provided. Any locomotive so leased shall be leased upon a fully found basis, that is to say, except as otherwise provided in Sections

8 and 9 hereof, the lessor shall be responsible for and shall bear the entire cost arising from the ownership, maintenance and operating thereof and the lessee for any such expense incurred by the lessee."

(Emphasis supplied.)

It will be noted from the foregoing language that when a through train from Pennsylvania crosses the State line into New Jersey, it becomes the train of CNJ in every respect, and equipment of the appellant which passes into New Jersey in this manner is deemed to have been leased by the appellant to CNJ.

Section 2 and 3 of the Agreement provide for the rent of locomotives so leased under the Agreement. Section 4 indicates the rates for locomotive (60a). Rates are computed in the manner provided in Schedule A (R. 64a). A reference to Schedule A is most revealing. In addition to fuel, water, lubricants, and repairs, it provides for a return on investment of 4½% per annum on the depreciated value of the locomotive and also for taxes, i.e., "For Pennsylvania's [appellant's] locomotives of each class, 5 *mills per annum on the depreciated value thereof*".

This last provision indicates that the rentals received in 1951 by the appellant for its locomotives while on the lines of CNJ included an amount to cover the Pennsylvania 5 mills capital stock tax. Thus, appellant has already received from CNJ the 5 mills tax which it now seeks to avoid in the present case by an exemption. Not only has the appellant failed to pay any tax in New Jersey for these locomotives, but has also been paid the equivalent of the Pennsyl-

vania Capital Stock tax on such locomotives while they have been out of Pennsylvania.

The rent for rolling stock leased by the respective parties under the Agreement were to be at the rates set forth in the "Code of Per Diem Rules of the Association of American Railroads" (Section 5 (a), R. 60a). The lessor reimburses the lessee for repairs (Section 6, R. 61a). This means that the appellant's freight cars used by CNJ on its lines have the same status as those used by other railroads. This justified the distinction drawn by the court below between the appellant's freight cars and locomotives used by CNJ (R. 215).

Freight cars destined for points beyond the eastern terminal of CNJ (e.g., New England), would be treated by CNJ the same as freight cars from other subscribers to the Agreement. If such cars should ever be returned to the appellant via CNJ tracks, such return would bear no relation to the eastbound trip, and provide no "regular" basis for allocation.

The officers and employees who served both CNJ and the appellant were paid by CNJ, including railroad retirement and unemployment taxes and office expenses. Appellant then reimbursed CNJ to the extent of 32% for officers and employes in the freight and passenger traffic departments and 22% in other departments (Section 9, R. 62a, 166a).

The Agreement then provided as follows (R. 62a):

> "Section 10. As between the parties, each party shall be solely responsible for personal injury or death suffered by any passenger, em-

> ployee or other person or for loss or damage to property of any person, firm or corporation (including the parties) *arising out of the use of such party*, whether or not any locomotive or other unit of equipment leased to such party under this Agreement or the handling of through service under this Agreement shall have been involved therein. The foregoing shall apply notwithstanding that such liability may have been caused by the negligence or misconduct of an employee of the other party, whether or not such employee was at the time being used by the former party."
>
> (Emphasis supplied.)

The foregoing provision also demonstrates that the operation of through trains either originating on, or destined for, appellant's tracks in Pennsylvania, are the complete responsibility of CNJ, and not the appellant, while such trains are operated in New Jersey (R. 169a, No. 17).

The Supplemental Agreement, made as of August 6, 1946, between CNJ and the appellant (Exhibit "B", R. 66a), provided for the temporary leasing of locomotives between the parties "for use in other than through service" on a basis similar to that used for locomotives operated in through service.

After studying the close relationship between CNJ and its subsidiary, the appellant, it is plain that the tax status of appellant in New Jersey is similar to that of CNJ in Pennsylvania. Appellant is not authorized to do business in New Jersey nor does it pay franchise or property taxes there (12, R. 49a;

166a, No. 15). Conversely, CNJ does no business in Pennsylvania, and pays no franchise or corporate net income taxes here (¶ 26, R. 55a; 168a, No. 15).

A consideration of the various agreements and other evidence in the Record, as outlined above, clearly indicates that the appellant has failed to sustain its burden of proof that any specific cars had acquired a situs in any other state outside Pennsylvania during 1951, or had even been continuously absent from Pennsylvania during that year.

III. No Lack of Equal Protection

The appellant contends that the tax in question violated the equal protection clause of the Fourteenth Amendment, because certain railroad companies having railroad track mileage inside and outside Pennsylvania received a mileage allocation against the rolling stock; whereas the appellant having no track mileage outside Pennsylvania did not receive such a mileage allocation.

A number of railroads which have track mileage inside and outside of Pennsylvania are consolidated railroads, i.e., railroads which have been domesticated in a number of different states.[28] In taxing such railroads domiciled in several states, the principle of *mobilia sequuntur personam* could be applied only on an apportionment basis; and there would be no other way to tax its rolling stock.

Any domestic railroad corporation which had tracks in other states would be entitled to such an allocation, because it was running trains in such other states, i.e., conducting its railroad business there.[29] Thus, the rolling stock apportioned in such other states on

[28] See *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 105 A. 2d 336 (1954), cert. den., 348 U.S. 857; *Commonwealth v. N. Y. C. & St. L. R. R. Co.*, 354 Pa. 388, 47 A. 2d 272 (1946), app. dis., 329 U.S. 682; *Fidelity Philadelphia Tax Case*, 354 Pa. 355, 47 A. 2d 267 (1946).

[29] See *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 60 S. Ct. 968, 84 L. Ed. 1254 (1940); *Illinois Central R.R. Co. v. Minnesota*, 309 U.S. 157, 162, 60 S. Ct. 419, 84 L. Ed. 670 (1940); R. 216.

a mileage basis would have a business and a tax situs outside of Pennsylvania. This situation does not apply to the appellant, because none of its cars or locomotives are engaged in its railroad operations when outside of Pennsylvania, but are being used by other railroads in their operations.[40]

Furthermore, the capital stock tax reports filed by railroads having track mileage inside and outside Pennsylvania did not indicate that the rolling stock to which the track mileage ratio was being applied included freight cars for which they received per diem car hire while on the lines of other railroads (R. 55a). In other words, the alleged discrimination, if any, would have been due to the imperfect knowledge of, or lack of notice to, or lack of inquiry by, the taxing officers, and would not constitute a violation of equal protection.[41]

In *Charleston Federal Sav. & Loan Asso. v. Alderson*,[42] this Court said:

> "Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, [citing cases] or which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxes property in a single class, [citing cases]"

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[40] See *Commonwealth of Kentucky v. Union Pacific R. R. Co.*, supra, note 22 (283 S.W. 119).

[41] *Liggett Co. v. Lee*, 288 U.S. 517, 540, 53 S. Ct. 481, 77 L. Ed. 929 (1933); *Commonwealth v. Koppers Co., Inc.*, 397 Pa. 523, 532, 156 A. 2d 328 (1959), app. dis., 364 U.S. 286 (1960).

[42] 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857 (1945).

Moreover, the railroads having track mileage inside and outside Pennsylvania paid franchise or property taxes to the other states in which a portion of their railroad track mileage was located (R. 54a, 55a, ¶25), whereas the appellant was not qualified or authorized to do business in any other state than Pennsylvania, and did not pay franchise or property taxes to other states other than Pennsylvania (R. 49a, ¶12).

Therefore, the court below properly held[43] that the tax settlement did not violate equal protection of the law.

CONCLUSION

Pennsylvania as the state of appellant's incorporation and domicile has properly levied capital stock tax on the entire value of the appellant's capital stock, without any deduction for freight cars which were temporarily outside of Pennsylvania under car hire agreements with other railroads.

The appellant was doing all of its business in Pennsylvania. Its business was operating a railroad. All of its tracks were in Pennsylvania. When its freight cars were outside of Pennsylvania, they were being operated by other railroads on their lines in their railroad business, and not in the railroad business of the appellant.

The appellant has failed to prove that any specific cars had acquired a situs outside of Pennsylvania

[43] R. 216.

during 1951, and had even been continuously absent from Pennsylvania during that year.

The Car Service and Per Diem Agreement shows that the freight cars lent by appellant to foreign railroads could not have acquired a permanent tax situs outside Pennsylvania, because:

(a) The extent of the absence of appellant's freight cars from Pennsylvania, or any interruption in their transit, is beyond the control of the appellant.

(b) The borrowing railroads are required by the Agreement to so route the appellant's cars that they will return to Pennsylvania as soon as possible. This requirement confirms the Commonwealth's domiciliary theory of taxation, because of the concept of the cars in transit constantly seeking to return to their home railroads.

(c) The Agreement does not mention "rentals", but imposes a per diem charge of $1.75, irrespective of the type or size or value of the freight car. This is merely a unit fee charged by all of the participating railroads, inter se, for the mutual right to borrow freight cars for convenient use in the transportation business of the borrowing company.

None of these features applied to the moveables involved in the cases relied upon by the appellant. An analysis of the decisions relating to pullman cars, tank cars or refrigerator cars plainly shows that these cars were being leased by their owners for profit in the regular course of the owner's business i.e., furnishing pullman car service, tank car service or refrigerator car service. In each case, the lessor corpo-

ration, unlike appellant, had some control over the use of its cars by the shippers or other customers with whom it was doing business.

This situation falls squarely within the holding of this Court in the *New York Central RR.* case,[44] which permitted the state of domicile to tax rolling stock absent from that state on lines of other railroads. It has never been reversed or modified. In *Standard Oil Co. v. Peck*,[45] it was distinguished because in the *New York Central* case, as in the present case,

> "* * * it did not appear that 'any specific cars or any average of cars' was so continuously in another state as to be taxable there. * * *"

Conversely, it is also clear from the *Union Pacific RR.*[46] case that other states could not have taxed the freight cars of the appellant while they were absent from Pennsylvania. These railroad cases are still good law, and sustain the Commonwealth's position in the instant case.

The present settlement produces no unconstitutional results. The railroads which have received the track mileage apportionment of rolling stock have had tracks outside of Pennsylvania on which their own trains were operated. This fact distinguishes these railroads from the appellant and similar railroads which have all of their track mileage and train operations in Pennsylvania. Such a distinction between the two groups of railroads will be sustained, because it has a reasonable and logical basis. It would be im-

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[44] 202 U.S. 584, supra, note 6.
[45] 342 U.S. 382, supra, note 19.
[46] 283 S.W. 119, supra, note 22.

possible to grant a mileage allocation to appellant, because it has no tracks outside of Pennsylvania, nor does it operate any of its trains outside of Pennsylvania.

Accordingly, this appeal should be dismissed, and the judgment entered in favor of the Commonwealth of Pennsylvania, as modified and affirmed by the Supreme Court of Pennsylvania, should be affirmed by this Court.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM EXHIBIT X

(R. 49a, 56a, 125, 130a)

CAR SERVICE AND PER DIEM AGREEMENT

DEFINITIONS

Home Car	A car on the road to which it belongs.
Foreign Car	A car on a road to which it does not belong.
Private Car	A car having other than railroad ownership.
Home	A location where a car is in the hands of its owner.
Home Road	The road which owns a car, or upon which the home of a private car is located.
Home Junction	A junction with the home road.
Subscriber	A road which is a subscriber to the Car Service and Per Diem Agreement.
Non-Subscriber	A road which is not a subscriber to the Car Service and Per Diem Agreement.

CODE OF CAR SERVICE RULES—FREIGHT

RULE 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

RULE 2

(A) Foreign cars on a direct connection must be forwarded to the home road loaded or empty in manner provided below:

(B) If empty at junction with the home road and loading at that point via the home road is not available, they must, subject to Rule 6, be delivered to it at that junction, unless an exception to the requirement be agreed to by roads involved. When holding road has no physical connection with the home road and is obliged to use an intermediate road or roads, to place the car on home rails under the provisions of this paragraph and the car has record rights to such intermediate road or roads, it may be so delivered.

(C) If empty at other than junction points with the home road, cars under this rule may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Moved locally in the direction of the home road, or

(3) When located in other than a Home District or a District contiguous thereto, loaded via any route to a destination within or in the direc-

tion of a Home District or to a destination within a District contiguous thereto (See Note D).

(4) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road, if to be loaded for delivery on or movement via the home road, or

(5) Delivered empty to home road at any junction point, subject to Rule 6, or

(6) Delivered empty to road from which originally received under load at the junction where received, or at another junction mutually agreed upon, if such road is also a direct connection of the home road, or

(7) Returned empty to the delivering road when handled only in switching service.

RULE 3

(A) Foreign cars at home on other than direct connections must be forwarded to the home road loaded or empty. Under this rule cars may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Loaded in the direction of the home road, or

(3) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road if to be loaded for delivery on or movement via the home road, or to a point in the direction of the home road, beyond the road on which the cars are located, or

(4) Delivered empty to road from which originally received, at the junction where received, or

at another junction mutually agreed upon, if impracticable to dispose of them under paragraph (1), (2) or (3) of this rule.

(5) When located in other than a Home District or a District contiguous thereto, loaded via any route to a destination within or in the direction of a Home District or to a destination within a District contiguous thereto (See Note D).

RULE 5

Empty cars of indirect ownership (Rule 2) to the road requesting the service may be short routed at a reciprocal rate of five cents (5c) per mile plus switching charges, with a minimum of one hundred (100) miles for each road handling the car, the road requesting the service to pay the charges.

RULE 6

If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with the Interchange Rules of the Mechanical Division, must be accepted by owners at any junction point.

RULE 7

Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery, and until they have been accepted by its inspector or returned to the delivering road.

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Supreme Court of the United States

OCTOBER TERM 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The purpose of this Reply Brief is clarification of the issues. This needs to be done because Appellee in its Brief has advanced arguments and theories (answered generally in Appellant's Brief) which, for the most part, were not recognized and relied upon, and which are at variance with the rulings and principles enunciated by the Supreme Court of Pennsylvania.

A. Appellant's Freight Cars

The issue between Appellant and the Supreme Court of Pennsylvania (hereinafter referred to as the state court) is clearly whether appellant's freight cars were habitually employed in Pennsylvania, the domiciliary state, and in other states so that the average unit rule of property tax apportionment applies. The holding of the state court that the rule does not apply is contended by appellant to be contrary (1) to the evidence in the Record and (2) to the decisions of this Court.

In *New York Central and Hudson River Railroad Co. v. Miller*,[1] where the freight cars of a New York corporation were on the lines of other railroads outside of New York, not on regular routes and schedules but designated as "random excursions of casually chosen cars," and in *Northwest Airlines Inc. v. Minnesota*,[2] where the airplanes were run on fixed routes and regular schedules in Minnesota, the domiciliary state, and in seven other Northwestern states, this Court sustained the unapportioned property tax of the domiciliary state on the basis of the home port vessel rule. Under that rule, the units of transportation equipment were held to have a situs at the owner's domicile in the absence of proof that certain specific units—not changing units as under the average unit rule—were *continuously and exclusively outside of the domiciliary state during the whole tax year*.

The state court in the instant case, but not Appellee in its Brief, recognizes that the decision of this Court in *Northwest Airlines* was "all but nullified" (R. 215) by its decision in *Braniff Airways Inc. v. Nebraska State Board*.[3] It recognizes, also, the average unit rule decisions of this Court but it distinguishes them on the basis of regularity of trips or movements,[4] "permanency" in non-domiciliary states,[5]

[1] 202 U.S. 584, 26 S. Ct. 714 (1906).
[2] 322 U.S. 292, 64 S. Ct. 950 (1944).
[3] 347 U.S. 590, 74 S. Ct. 757 (1954).
[4] *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 54 S. Ct. 152 (1933); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149, 20 S. Ct. 631 (1900).
[5] *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct.

and "almost continuously outside" of domiciliary state.[6] On the basis of these distinctions, it concluded that the tank and refrigerator car cases (Note 4) do not alter the holding in the *Miller* case "in respect to the tax situs of freight cars which are freely interchanged by cooperating railroads:" and, accordingly, it ruled specifically (R. 213, 215, 216) that appellant's freight cars "which move irregularly and continuously about the country * * * do not attain the degree of continual and regularly scheduled presence"—even though *a certain average number may be present in another state* —to permit an apportioned tax by a non-domiciliary state or to prohibit an unapportioned tax by Pennsylvania.

Appellant submits that the ruling of the state court is contrary to the evidence in the Record in the instant case and to the facts and decisions in the average unit rule cases:

1. Operating Agreement:

The state court overlooks the Stipulation of the parties (S/F, Par. 14, R. 50a) that appellant's freight cars while on its lines in Pennsylvania and on the lines of CNJ in New Jersey run on fixed routes and regular schedules as a part of through trains and that the authorities are unanimous that in such case the average unit rule applies.

2. Car Service and Per Diem Agreement:

(a) The state court overlooks and disregards the vital stipulated fact (S/F, Par. 15, R. 50a, 51a) that while off the lines of appellant and CNJ, the entire fleet of 3074 freight cars of appellant was "regularly, habitually and or continuously employed" on lines of other railroads in, in and out, and out of Pennsylvania. Instead, the state court applies its own descriptive terms of "irregular," "indiscriminate," "casual," and "random excursions" to the movement of appellant's cars.

(b) It is, also, stipulated by the parties that a time and use formula of car days indicates that an average of 2189.30

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432 (1949); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905).

[6] *Standard Oil Co. v. Peck*, 342 U.S. 382, 72 S. Ct. 309 (1952).

of appellant's freight cars (71% of time and number) was outside of Pennsylvania during the year (See p. 8 of Appellant's Brief).

(c) The fact of habitual and continuous employment, which is the basis of the average unit rule, exists in the instant case but was absent in the *Miller* case, and, therefore, the *Miller* case is not controlling here. This fact, also, is the basis for the use of the average unit rule to determine the average number of units which is said to be *permanently located* or to have a *permanent situs* in the non-domiciliary states in the *Ott* and *Union Refrigerator* cases cited in Note 5 herein.

(d) Contrary to the state court in the instant case, the fact of regularity of trips and movement did not exist in the two refrigerator car cases cited in Note 4. The trips and movements were irregular and indiscriminate and yet the average unit rule was applied to determine a *small* average number (10 and 40) to be taxable by the non-domiciliary state. In the *Johnson Oil* case (Note 4), the tank cars were reloaded on the average of once a month in Oklahoma and an average of 16% were in Oklahoma and the remaining 84% were in transit outside the state.

(e) An analysis of the decisions establishes that when units of transportation equipment are used and employed in several states, the average unit rule applies where a reasonable time and use formula determines that an average number of units are present within a non-domiciliary state[1] or are *not* present in, or are without, the domiciliary state.[2]

These reasons warrant reversal of the state court's ruling sustaining the unapportioned tax on apellant's freight cars in both situations.

Several contentions advanced in Appellee's Brief are answered as follows:

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[1] Cases cited in Notes 31-36 of Appellant's Brief.

[2] Cases cited in Note 37 of Appellant's Brief.

1. It represents (pp. 2 and 3) that an exemption is involved and the tax statute should be strictly construed when requiring the listing of tangible personal property "permanently located outside of the state." This is clearly in error since the state court has held that a constitutional deduction and not an exemption is involved.[9]

2. In disregard of the Stipulation of the parties that appellant's freight cars were habitually employed outside the state, appellee in its statement of Questions Presented (p. 4) refers to them as "temporarily outside".

3. Appellee contends (pp. 42-47) that because of the basis of computation of compensation to the owner, appellant's freight cars on the lines of CNJ under the Operating Agreement have the same status as those of its cars on the lines of other railroads under the Car Service and Per Diem Agreement. It is difficult to conceive how the rate of compensation affects the legal significance of stipulated use on regular routes and schedules.

4. Appellee contends (pp. 36-42 of its Brief) that the car day ratio is not a valid test to determine the location of appellant's cars. This ratio was introduced into the Record by Stipulation of the parties and Exhibits thereto (S F, Par. 15, Exhibits Y-1 to Y-6 inclusive, R. 50a, 51a, 130a-144a) without objection by appellee and therein are set forth the names of railroads, *their locations* and the number of car days on each. Appellee's contention is based upon forced statistics and assumptions, not in the Record, which disregard numbers of car days on, and location of, individual railroads as shown in the Record. The car hire ratio, which is the equivalent of the car day ratio, was approved by this Court in *Union Refrigerator Transit Co. v. Kentucky*.[10]

5. Appellee (pp. 22-31 of its Brief), but not the Supreme Court of Pennsylvania, distinguishes some, but not all, of

[9] *Com. v. Westinghouse Air Brake Co.*, 254 Pa. 12, 14, 95 A. 807 (1915).

[10] 199 U.S. 194, 26 S. Ct. 36 (1905).

the average unit rule cases upon the ground that the owners were employing the transportation equipment in their business whereas appellant's freight cars under per diem rental were employed in the business of the using railroads. This distinction is without foundation and is invalid.

The tax at issue is not a tax upon appellant for the privilege of doing business. It is a tax on property and the jurisdiction to levy such a tax, or a tax on income from property, is physical presence and employment within the state whether by owner or another.[11]

Appellant, by membership in the Association of American Railroads, is a part of the integrated railroad system in the United States. A part of its business is the interchange of its freight cars and the receipt of compensation therefor. It is just as much engaged in business where its cars are employed as are the tank and refrigerator car owners.

Private car companies *and railroads* own tank and refrigerator cars and compensation for their use over railroad lines is the same per diem rental of $1.75 as for appellant's freight cars, or at the option of the owner or controlling company (usually a railroad), a mileage rate. (8 F, Par. 13, R. 49a, 50a, Exhibit X, Code of Per Diem Rules—Freight, Rule 1(b) and 1(c)). These cars are interchanged. This fact does not affect application of average unit rule to determine property tax liability in states where used and operated.[12]

B. Discrimination

Appellee (pp. 48-50 of its Brief) denies discrimination against appellant on two grounds: (1) consolidation of railroads with charters in more than one state with inference that only such railroads were allowed exclusion from tax

[11] *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959); *Com. v. American Bell Telephone Co.*, 129 Pa. 217, 18 A. 122 (1889); *Annotation*, 49 A.L.R. 1103.

[12] *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 82, 19 S. Ct. 599 (1899).

of their freight cars while on lines of other railroads, and (2) imperfect knowledge in tax reports and mistake or error by tax authorities.

The first ground is not a fact of record. There are many railroads with Pennsylvania Charters only which have railroad trackage extending beyond the state, some of which are the Pennsylvania Railroad, the Delaware, Lackawanna and Western Railroad and the Lehigh Valley Railroad;[1] and it is stipulated by the parties (S. F. Par. 25, R. 54a, 55a) that *all* railroads with trackage outside were allowed the exclusion from tax for their freight cars while on the lines of other railroads.

Appellee's second ground is irrelevant and immaterial. The state court has denied discrimination on the ground of classification in the statute between railroads with no trackage outside of the state and those with trackage outside. Appellee is bound by, and must defend on the basis of, this construction of the tax statute by the state court. In Appellant's Brief (pp. 39, 40), this classification is shown to be invalid.

C. Conclusion

Appellant submits that the discussion in this Reply Brief supports its conclusions and prayers to this Court as set forth in its Brief (pp. 42, 43).

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[1] 297 Pa. 308, 147 A. 242 (1929); 145 Pa. 96, 22 A. 157 (1891); 145 U. S. 192, 12 S. Ct. 806 (1892).